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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 276. 42.

LOUIS LOEB, PLAINTIFF IN ERROR,

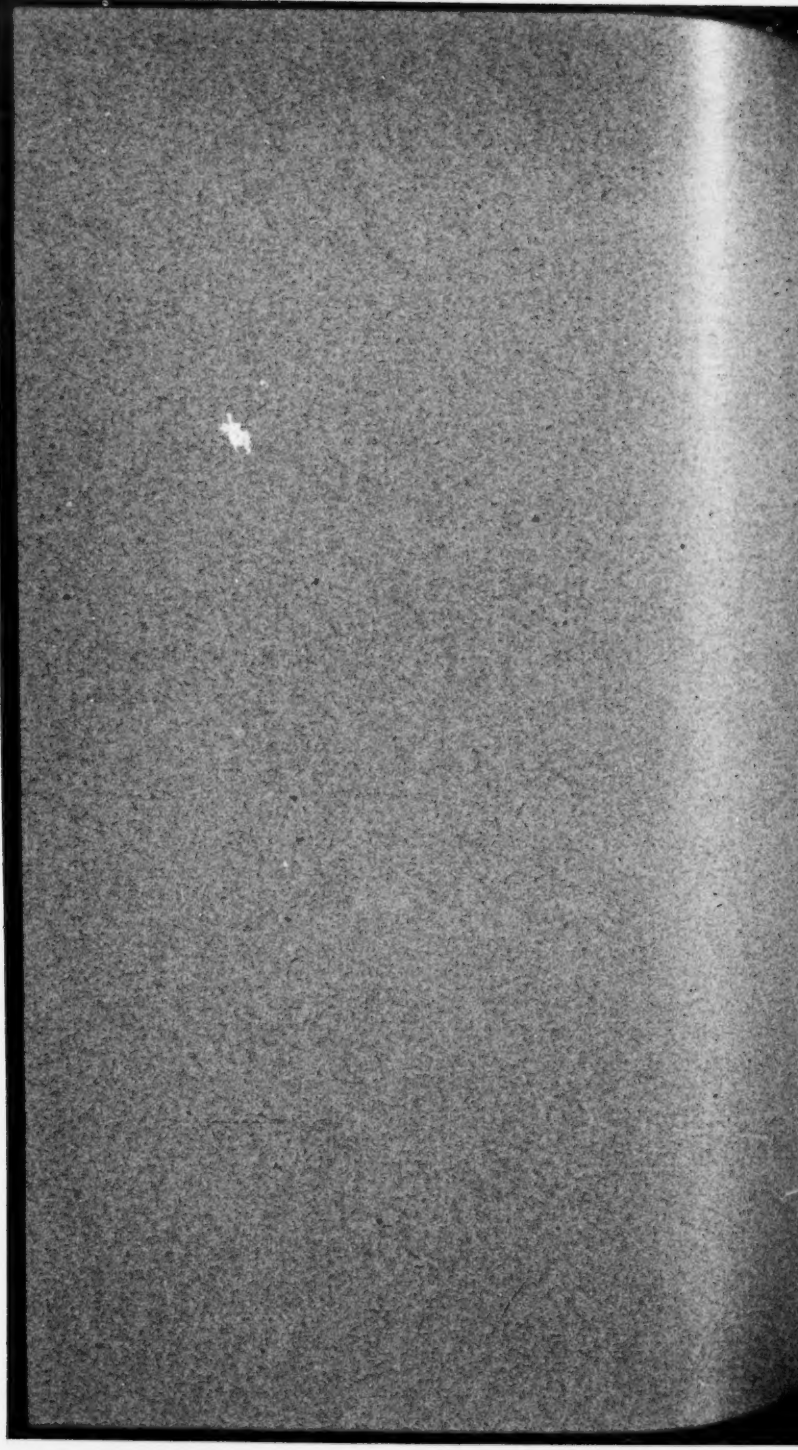
vs.

THE TRUSTEES OF COLUMBIA TOWNSHIP, HAMILTON COUNTY, OHIO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 27, 1899.

(17,385.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 10, 1899.

1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Western Division, }

At a stated term of the circuit court of the United States of America within and for the western division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Cincinnati, Ohio, in said district, on the first Tuesday of October, being the fourth day of that month, in the year of our Lord one thousand eight hundred and ninety-eight, and of the American Independence the one hundred and twenty-third—present, the Honorable A. C. Thompson, district judge—among the proceedings had were the following, to wit:

LOUIS LOEB, Plaintiff,
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP, Hamilton County, Ohio, Defendant. } No. 5099. At Law.

Be it remembered that heretofore, to wit, on the 4th day of November, A. D. 1897, came the plaintiff, by his counsel, and filed in the clerk's office of the court aforesaid his certain petition herein against the defendant; said petition is clothed in the words and figures following, to wit:

Petition.

2 In the Circuit Court of the United States for the Southern District of Ohio, Western Division.

LOUIS LOEB, Plaintiff,
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP, HAMILTON County, Ohio, Defendant. } Petition.

Plaintiff is a citizen and resident of the State of Indiana. Defendant, The Trustees of Columbia Township of Hamilton County, State of Ohio, is a corporation organized under the laws of the State of Ohio and a resident of the southern district of Ohio, western division, and a citizen of said State of Ohio.

Plaintiff says that on April 27, 1893, the legislature of the State of Ohio passed an act entitled "An act to authorize the trustees of Columbia township, Hamilton county, Ohio, to widen and extend Williams avenue," which act is fully set out in volume 90, pp. 251 and 252, of the Local Laws of the State of Ohio.

Said act provides, among other things, as follows, viz:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That the trustees of Columbia township be, and they are hereby authorized and required to widen and extend Williams avenue from its intersection with the Duck Creek road eastwardly along the north lines of sections thirty-three and twenty-seven in

said township, to a point where the same intersects the Madison road; said avenue to be widened to a width of sixty feet, of which said section lines are to be the center line, and shall appropriate and enter upon and hold any real estate within the township necessary for such purpose."

"SECTION 2. The trustees of said Columbia township, shall immediately make application to the probate court of the county as provided in section 2236 of the Revised Statutes of Ohio, and
3 thereafter, as far as practicable, the proceedings shall conform to and be had under the provisions of sections 2236 to 2261, inclusive of the Revised Statutes of Ohio."

"SECTION 4. For the purpose of raising money necessary to meet the expense of the improvement, the trustees of said township are hereby authorized and directed to issue the bonds of the township, payable in instalments or at intervals not exceeding in all the period of six (6) years, bearing interest at the rate of six (6) per cent. per annum, which bonds shall not be sold for less than their par value."

"SECTION 5. This act shall take effect and be in force from and after its passage."

Thereupon the trustees of Columbia township, acting under the aforesaid act and proceeding to make said improvement, appropriated the land for said avenue in the manner provided in said act.

For the purpose of raising the money necessary to meet the expense of said appropriation, the trustees of said township, on or about the 29th day of September, 1894, duly executed and issued, in proper form and in accordance with the terms and provisions of the above act, twenty-five bonds of the said Columbia township, of $500 each, five payable respectively in 1, 2, 3, 4, and 5 years from date and one, for $432.00, payable 1 year from date, all dated September 29, 1894, and numbered consecutively from one to twenty-six, inclusive, and all payable to the order of the bearer, at the office of the treasurer of said county, and bearing interest at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year, the same being represented, up to maturity of said bonds, by coupons thereto attached.

On or about September 29, 1894, said bonds were sold by said Township to a *bona fide* purchaser and the highest bidder for
4 $13,325.00 and accrued interest. On or about September 29, 1895, the trustees of said township paid bonds Nos. 1, 2, 3, 4, and 5, then due, each for $500.00, and No. 26, for $432.00, and the interest coupons, payable September 29, 1895, on all of the aforesaid twenty-six bonds.

On March 29, 1896, they paid the interest coupons, payable March 29, 1896, on the twenty bonds still remaining unpaid, including the five hereafter set forth.

First Cause of Action.

1. Plaintiff says that his action is founded upon and he is the *bona fide* owner and holder for value of bond No. 6 of the aforesaid issue, of which the following is a true copy, namely:

5 No. 6. *Six Per Cent. Bond.* $500.

COLUMBIA TOWNSHIP, *Hamilton County, State of Ohio.*

This is one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April 27, 1893, authorizing the trustees of Columbia township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike and one bond for four hundred and thirty-two dollars for the payment of twelve thousand nine hundred and thirty-two dollars, for widening and extending said avenue.

By virtue of said act, the Trustees of Columbia Township hereby acknowl*e*g*d*e said township indebted to the bearer in the sum of five hundred dollars, which sum they, as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September, 1896, and also interest thereon at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached.

In witness whereof, we, the undersigned Trustees of Columbia Township, Hamilton County, Ohio, have hereunto set our hands and seals this 29th day of Sept. A. D. 1894.

Z. T. DEMAR, [SEAL.]
W. H. SETTLE, [SEAL.]
E. F. SEILKOP, [SEAL.]
Trustees of Columbia Township.

[Columbia Township Seal, Hamilton Co., Ohio.]

E. C. FOWBLE,
Clerk of Township.

Plaintiff has made demand for payment of said bond in accordance with the terms thereof, but defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said bond the sum of five hundred dollars ($500), with interest from September 29, 1896, for which he asks judgment.

6 *For Second Cause of Action.*

2. Plaintiff says that his action is founded upon and he is the *bona fide* owner and holder for value of bond No. 7 of the aforesaid issue, of which the following is a true copy, namely:

No. 7. *Six Per Cent. Bond.* $500.

COLUMBIA TOWNSHIP, *Hamilton County, State of Ohio.*

This is one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April 27, 1893, authorizing the trustees of Columbia township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike and one bond for four hundred and thirty-two dollars for the payment of twelve thousand nine hundred and thirty-two dollars, for widening and extending said avenue.

By virtue of said act, the Trustees of Columbia Township hereby acknowl*e*g*d*e said township indebted to the bearer in the sum of five hundred dollars, which sum they, as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September 1895, and also interest thereon at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached.

In witness whereof, we, the undersigned Trustees of Columbia Township, Hamilton County, Ohio, have hereunto set our hands and seals this 29th day of Sept. A. D. 1894.

Z. T. DEMAR, [SEAL.]
W. H. SETTLE, [SEAL.]
E. F. SEILKOP, [SEAL.]
Trustees of Columbia Township.

[Columbia Township Seal, Hamilton Co., Ohio.]

E. C. FOWBLE,
Clerk of Township.

Plaintiff has made demand for payment of said bond in accordance with the terms thereof, but defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said bond the sum of five hundred dollars ($500), with interest from September 29, 1896, for which he asks judgment.

7 *For Third Cause of Action.*

3. Plaintiff says that his action is founded upon and he is the *bona fide* owner and holder for value of bond No. 8 of the aforesaid issue, of which the following is a true copy, namely:

No. 8. *Six Per Cent. Bond.* $500.

COLUMBIA TOWNSHIP, *Hamilton County, State of Ohio.*

This one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April

27, 1893, authorizing the trustees of Columbia township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike and one bond for four hundred and thirty-two dollars for the payment of twelve thousand nine hundred and thirty-two dollars, for widening and extending said avenue.

By virtue of said act, the Trustees of Columbia Township hereby acknowlegde said township indebted to the bearer in the sum of five hundred dollars, which sum they, as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September 1896, and also interest thereon at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached.

In witness whereof, we, the undersigned Trustees of Columbia Township, Hamilton County, Ohio, have hereunto set our hands and seals this 29th day of Sept. A. D. 1894.

Z. T. DEMAR, [SEAL.]
W. H. SETTLE, [SEAL.]
E. F. SEILKOP, [SEAL.]
Trustees of Columbia Township.

[Columbia Township Seal, Hamilton Co., Ohio.]

E. C. FOWBLE,
Clerk of Township.

Plaintiff has made demand for payment of said bond in accordance with the terms thereof, but defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said bond the sum of five hundred dollars ($500), with interest from September 29, 1896, for which he asks judgment.

8 *For Fourth Cause of Action.*

4. Plaintiff says that his action is founded upon and he is the *bona fide* owner and holder for value of bond No. 9 of the aforesaid issue, of which the following is a true copy, namely:

No. 9. *Six Per Cent. Bond.* $500.

COLUMBIA TOWNSHIP, *Hamilton County, State of Ohio.*

This is one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April 27, 1893, authorizing the trustees of Columbia township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike and one bond for four hundred and thirty-two dollars for the payment of twelve thousand

nine hundred and thirty-two dollars, for widening and extending said avenue.

By virtue of said act, the Trustees of Columbia Township hereby acknowl*egde* said township indebted to the bearer in the sum of five hundred dollars, which sum they, as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September 1896, and also interest thereon at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached.

In witness whereof, we, the undersigned Trustees of Columbia Township, Hamilton County, Ohio, have hereunto set our hands and seals this 29th day of Sept. A. D. 1894.

Z. T. DEMAR, [SEAL.]
W. H. SETTLE, [SEAL.]
E. F. SEILKOP, [SEAL.]
Trustees of Columbia Township.

[Columbia Township Seal, Hamilton Co., Ohio.]

E. C. FOWBLE,
Clerk of Township.

Plaintiff has made demand for payment of said bond in accordance with the terms thereof, but defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said bond the sum of five hundred dollars ($500), with interest from September 29, 1896, for which he asks judgment.

9 *For a Fifth Cause of Action.*

5. Plaintiff says that his action is founded upon and he is the *bona fide* owner and holder for value of bond No. 10 of the aforesaid issue, of which the following is a true copy, namely:

No. 10. *Six Per Cent. Bond.* $500.

COLUMBIA TOWNSHIP, *Hamilton County, State of Ohio.*

This is one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April 27, 1893, authorizing the trustees of Columbia township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike and one bond for four hundred and thirty-two dollars for the payment of twelve thousand nine hundred and thirty-two dollars, for widening and extending said avenue.

By virtue of said act, the Trustees of Columbia Township hereby acknowl*egde* said township indebted to the bearer in the sum of five hundred dollars, which sum they, as trustees, and for their suc-

cessors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September, 1896, and also interest thereon at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached.

In witness whereof, we, the undersigned Trustees of Columbia Township, Hamilton County, Ohio, have hereunto set our hands and seals this 29th day of Sept. A. D. 1894.

Z. T. DEMAR, [SEAL.]
W. H. SETTLE, [SEAL.]
E. F. SEILKOP, [SEAL.]
Trustees of Columbia Township.

[Columbia Township Seal, Hamilton Co., Ohio.]

E. C. FOWBLE,
Clerk of Township.

Plaintiff has made demand for payment of said bond in accordance with the terms thereof, but defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said bond the sum of five hundred dollars ($500), with interest from September 29, 1896, for which he asks judgment.

10 *For Sixth Cause of Action.*

6. Plaintiff's action is founded upon and he is the *bona fide* owner and holder for value of coupon on bond No. 6 of the aforesaid issue, of which the following is a true copy, namely:

$15.00. Coupon No. 4.

The treas. Columbia Tp. will pay to bearer at 4th nat'l bank in Cincin., on the 29th day of Sept., 1896, fifteen dollars, six months' interest on the bond No. 6, for $500, issued Sept. 29, 1894.

E. C. FOWBLE, *Clerk.*

Plaintiff has made demand for payment of said coupon in accordance with the terms thereof, but the defendant refuses to pay the same or any part thereof. There is due the plaintiff from said defendant on said coupon the sum of $15.00, with interest from September 29, 1896, for which he asks judgment.

For Seventh Cause of Action.

7. Plaintiff's action is founded upon and he is the *bona fide* owner and holder for value of coupon on bond No. 7 of the aforesaid issue, of which the following is a true copy, namely:

$15.00. Coupon No. 4.

The treas. Columbia Tp. will pay to bearer at 4th nat'l bank in Cincin., O., on the 29th day of Sept., 1896, fifteen dollars, six months' interest on the bond No. 7, for $500, issued Sept. 29, 1894.

E. C. FOWBLE, *Clerk.*

Plaintiff has made demand for payment of said coupon in accordance with the terms thereof, but the defendant refuses to pay the same or any part thereof. There is due the plaintiff from said defendant on said coupon the sum of $15.00, with interest from September 29, 1896, for which he asks judgment.

11 *For Eighth Cause of Action.*

8. Plaintiff's action is founded upon and he is the *bona fide* owner for value of coupon No. 8 of the aforesaid issue, of which the following is a true copy, namely:

$15.00. Coupon No. 4.

The treas. Columbia Tp. will pay to bearer at 4th nat'l bank at Cincin., O., on the 29th day of Sept., 1896, fifteen dollars, six months' interest on the bond No. 8, for $500, issued Sept. 29, 1894.

E. C. FOWBLE, *Clerk.*

Plaintiff has made demand for payment of said coupon in accordance with the terms thereof, but the defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said coupon the sum of fifteen dollars, with interest from September 29, 1896, for which he asks judgment.

12 *For Ninth Cause of Action.*

9. Plaintiff's action is founded upon and he is the *bona fide* owner for value of coupon No. 9 of the aforesaid issue, of which the following is a true copy, namely:

$15.00. Coupon No. 4.

The treas. Columbia Tp. will pay to bearer at 4th nat'l bank at Cincin., O., on the 29th day of Sept., 1896, fifteen dollars, six months' interest on the bond No. 9, for $500, issued Sept. 29, 1894.

E. C. FOWBLE, *Clerk.*

Plaintiff has made demand for payment of said coupon in accordance with the terms thereof, but the defendant refuses to pay the same or any part thereof.

There is due the plaintiff from said defendant on said coupon the sum of fifteen dollars, with interest from September 29, 1896, for which he asks judgment.

For Tenth Cause of Action.

10. Plaintiff's action is founded upon and he is the *bona fide* owner and holder for value of coupon on bond No. 10 of the aforesaid issue, of which the following is a true copy, namely:

$15 00. Coupon No. 4.

The treas. Columbia Tp. will pay to bearer at 4th nat'l bank in Cincin., O., on the 29th day of Sept., 1896, fifteen dollars,
13 six months' interest on the bond No. 10, for $500, issued Sept. 29, 1894.

E. C. FOWBLE, *Clerk.*

Plaintiff has made demand for payment of said coupon in accordance with the terms thereof, but the defendant refuses to pay the same or any part thereof. There is due the plaintiff from said defendant on said coupon the sum of $15.00, with interest from September 29, 1896, for which he asks judgment and for his costs in this action.

C. HAMMOND AVERY,
Attorney for Plaintiff.

UNITED STATES, }
State of Ohio, Hamilton County, } *ss:*

C. Hammond Avery, being first duly sworn, says that the foregoing action is founded upon written instruments for the payment of money, and such instruments are in his possession.

That the plaintiff is not a resident and is absent from Hamilton county, State of Ohio, and also from the southern district, western division of Ohio, and that the allegations of the foregoing petition are true, as he believes.

C. HAMMOND AVERY.

Sworn to before me and subscribed in my presence this 3rd day of November, 1897.

[SEAL.] ALBERT WILLIAMSON,
Notary Public, Hamilton County, Ohio.

14 *Præcipe.*

Clerk: Issue summons, endorsed: Action for money; amount claimed, $2,575.00, with interest thereon at six per cent. from September 29, 1896.

C. HAMMOND AVERY,
Attorney for Plaintiff.

And afterwards, to wit, on the same day as aforesaid, there was issued out of the clerk's office of the court aforesaid our certain summons, directed to the marshal of the district and against the defendant herein; said summons is clothed in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA, *Southern District of Ohio,* } ss:

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Trustees of Columbia Township, Hamilton County, Ohio, a corporation organized under the laws of the State of Ohio, citizen of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the fifth Tuesday in the month of November, 1897, to answer unto Louis Loeb, citizen of and resi-
15 dent in the State of Indiana, in civil action for money; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this fourth day of November, A. D. 1897, and in the 122nd year of the Independence of the United States of America.

Attest:

[SEAL.] B. R. COWEN, *Clerk,*
By ROBERT C. GEORGI, *Deputy.*

Endorsed: $10.00 deposited security for costs. Action for the recovery of money. Amount claimed, $2,575.00, with interest thereon at six per cent. from September 29, 1896, for which judgment may be taken, unless they answer on or before the fifth Tuesday in the month of November, 1897.

16 And afterwards, to wit, on the 11th day of November, A. D. 1897, came the marshal of the district, to whom the aforesaid summons was in form directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings thereon endorsed, in the words and figures following, to wit:

Marshal's Return of Summons.

Received this writ on the 4th day of November, A. D. 1897; and on the 6th day of November, A. D. 1897, I served the same by handing a true copy thereof, with the endorsement thereon, to David L. Sampson and Wm. Settle, trustees of Columbia township; and on the 6th day of November, A. D. 1897, I left a like copy thereof, with the endorsement thereon, at the usual place of residence, in the hands of Minnie Rempe, wife of John Rempe, trustee of Columbia township.

Fees: Total, $8.70.

MICHAEL DEVANNEY, *Marshal,*
By W. H. SPILLARD, *Deputy.*
R. P. SNYDER, *Deputy.*

17 And afterwards, to wit, on the 16th day of November, A. D. 1897, the following cost bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Cost Bond.

LOUIS LOEB
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP, Hamilton County, Ohio. } No. 5099. Cost Bond.

I hereby acknowledge myself security for costs in this case.
SAMUEL S. BLOOM. [SEAL.]

Taken and acknowledged before me this 16th day of November, 1897.
ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk, U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Samuel S. Bloom, a resident of said district, do solemnly swear that after paying my just debts and liabilities I am worth two thousand dollars in real estate within the jurisdiction of this court and subject to execution, levy, and sale.
SAMUEL S. BLOOM.

Sworn to and subscribed before me this 16th day of Nov., 1897.
ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk, U. S. Circuit Court, S. D. O.*

18 And afterwards, to wit, on the 30th day of November, A. D. 1897, the following demurrer was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Demurrer.

The Circuit Court of the United States, Southern District of Ohio, Western Division.

LOUIS LOEB, Plaintiff,
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP, Hamilton County, Ohio, Defendant. } No. 5099. Demurrer.

Now comes the defendant and demurs to the several causes of action in the petition of plaintiff herein, for the reason that the same do not state facts sufficient to constitute a cause of action against this defendant.

BURCH & JOHNSON,
Attorneys for Defendants.

And afterwards, to wit, on the 9th day of January, A. D. 1899, the following opinion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge A. C. Thompson, District Judge.

19 United States Circuit Court, Southern District of Ohio, Western Division.

LOUIS LOEB, Plaintiff,
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP, HAMILTON County, Ohio, Defendant. } No. 5099.

This case is submitted to the court on a demurrer to the petition. The demurrer alleges that the petition does not state facts sufficient to constitute a cause of action.

The points made in argument in support of the demurrer are:

I. The petition does not show that the plaintiff, Louis Loeb, is the original holder of the bonds sued on, and if he be an assignee or subsequent holder thereof he is not entitled to maintain this action, because the bonds are payable to bearer, and were not made by a corporation.

II. That the act of the General Assembly of the State of Ohio, under and by virtue of which the bonds were issued, contravenes the provisions of the constitution of the State of Ohio, and that therefore the bonds are invalid.

III. That said act contravenes the provisions of the Constitution of the United States, and that therefore the bonds are invalid.

20 First. The first point is predicated on the assumption that the township of Columbia is not a corporation within the meaning of the act of Congress of August 13, 1888 (1 Supplement, 612), one provision of which reads as follows:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The argument in support of this proposition assumes that the corporation contemplated by this law must have all the powers and attributes of a private corporation, and authorities are cited to show that the quasi corporation known as the township of Columbia is wanting in this respect.

But section 1376 of the Revised Statutes of Ohio provides that:

"Every civil township heretofore or hereafter lawfully laid off and designated, is declared to be, and is hereby constituted, a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law; it shall be capable of suing and being sued, pleading and being impleaded."

And the supreme court of Ohio has held that:

"For township liabilities an action lies against the trustees, and it is better to sue them without giving their individual names."

Harding *v.* Trustees of New Haven Township, 3 Ohio, 227.
Trustees of Concord Township *v.* Miller, 5 Ohio, 184.
Wilson *v.* Trustees of No. 16, 8 Ohio, 174.

In Lincoln County *v.* Luning, 133 U. S., 530, it is said:

"With regard to the first objection, it may be observed that
21 the records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established."

Again:

"The power to contract with citizens of other States implies liability to suit by citizens of other States."

Clearly Columbia township is a corporation "for the purpose of enjoying and exercising the rights and privileges conferred upon it by law," and it is capable of being sued upon liabilities which by law it is authorized to incur. The demurrer cannot be sustained upon this ground.

Second. It is claimed that it was not within the competency of the General Assembly to—

"authorize the trustees of a particular township to widen and extend a certain road in a prescribed manner; that the exercise of such power over the affairs of a township was administrative in character and not legislative, and that the act in question is for such reason invalid."

In State *ex rel.* Hibbs *v.* Commissioners, 35 O. S., 458, paragraphs 2, 3, & 4 of the syllabus read as follows:

2. "An act providing for the improvement of a designated county road, is local in its nature, and not in conflict with article 2, section 26, of the constitution, which provides that, 'all laws of a general nature shall have a uniform operation throughout the State.'"

3. "An act requiring county commissioners to cause a designated road to be improved, and to levy a tax to defray the expense thereof, where the road is open to the public, is not invalid for want of power in the General Assembly to pass it."

4. "An act providing 'that the commissioners of Franklin county be, and they are hereby, authorized and directed to levy
22 * * * a special tax not to exceed,' etc., to improve a county road, is a mandatory statute, and the commissioners may be compelled by mandamus to obey its provisions."

The act under consideration in that case which was declared to be constitutional reads as follows:

"SECTION 1. That the commissioners of Franklin county be, and they are hereby, authorized and directed to levy, at their June session, A. D. 1877, a special tax not to exceed the amount of the estimate of the engineer as hereinafter provided, for the purpose of building, grading, and graveling or macademizing the road from

South High street, in the city of Columbus, along the Green Lawn Avenue road to its terminus in the old Chillicothe road."

"SEC. 2. The said commissioners shall cause a survey and estimate of said road to be made by some competent engineer, and the letting for said improvement provided for in section one shall not exceed the amount of such estimate after expenses are paid; and the commissioners in these proceedings shall be governed by the laws now in force, so far as they may be applicable, relating to their duties in regard to free turnpike roads."

"SEC. 3. This act shall take effect and be in force from and after its passage." 74 Ohio L., 472.

The answer of the commissioners contains the following averments:

"'This board does not recognize the necessity of said improvement. This improvement consists in part, in the building, grading, and graveling, or macademizing of a street within the corporate limits of the city of Columbus. It will not be of a general benefit, but will be of local benefit and interest only to those using Green Lawn cemetary as a burial place, to those citizens who own lands contiguous to or in the vicinity of said road, and to such others as may prefer to use this road to other roads leading in the same general direction.

"'The board do not deem it just to make such improvement at the expense of the whole county, and do not believe that the legislature intended, by the acts set forth in the writ, to compel this board to make said improvement whether the doing so met with the approval of its judgment or not.

23 "'The board regards said act of the legislature to be of doubtful constitutionality, if it should be construed to intend that the board shall make said improvement, and shall levy a tax to pay the same upon the whole county'" (p. 460).

And counsel for the commissioners say:

"The respondents claim that the law as passed is unconstitutional and void, and that they are not bound to act under it, for the following reasons. * * *

"2. The General Assembly cannot constitutionally compel them, without their consent, nor compel the people of Franklin county, acting through them as their representatives, to make an improvement which is of local use solely.

"3. Under the constitution and laws of Ohio the board of county commissioners are to be the sole judges of the necessity of a merely local improvement.

"4. The improvement in question is such a local improvement, and is not of such a public character as to give the General Assembly power over it" (p. 463).

The court say, at page 466:

"The action is to compel the commissioners of Franklin county to levy a tax 'for the purpose of building, grading and graveling or macademizing' a road, commencing in the city of Columbus and intersecting a public road near the city. * * * The tax is provided for by an act passed in 1877, set forth in the statement

of the case, but the commissioners decline to make the improvement, on several grounds, which we will now consider.

"3. The power of the legislature to pass a mandatory statute, requiring the commissioners to levy the tax and improve the road in question, is denied by the defendant. The only provision which the constitution contains with respect to the county commissioners is the following: 'The commissioners of counties, the trustees of townships, and similar boards, shall have power of local taxation as may be prescribed by law.' Art. 10, sec. 7. Manifestly this is no limitation on the power of the General Assembly; and the inquiry therefore is as to the extent of such power. That it
24 is only legislative is conceded, but that is undeniably a very broad power and includes, generally, the right to direct, *in invitum*, the construction and *and* repair of public highways, and the levy of taxes to defray the necessary expenses thereof. That the power is liable to great abuse is denied by no one, but the responsibility, as well as the power, rests with the legislature. Many cases may be found which go further in support of this principle than we might be willing to go. People *v.* Flagg, 46 N. Y., 401; Philadelphia *v.* Field, 58 Penn. St., 320. See Lima *v.* McBride, 34 Ohio St., 338."

This decision was rendered in 1880 and was followed by numerous acts of the General Assembly directing mandatorily the improvement of designated roads, streets, and avenues in various parts of the State. These acts contained directions, more or less specific, for the improvement of said roads, etc., by widening, extending, grading, graveling, macademizing, etc., and provided for the assessment of the expense of the improvement wholly or in part on the abutting lands.

The decision was recognized by the legislature as authority for the acts contained in the cases below cited.

In Weston *v.* Commissioners, 6 Ohio Circuit Court Reports, 641, the act under consideration was entitled "An act to extend, widen, grade, gravel, macademize, and improve Erie avenue, in Columbia township, Hamilton county, Ohio," and provided for the assessment of the cost and expense of the improvement on the "lots and lands situated within one mile on each side thereof." The commissioners of Hamilton county were "authorized and required" to make the improvement (87 Ohio Laws, 577).

25 The court say the claims of the plaintiffs are substantially these:

5th. "That said act in its operation is most unequal and unjust,—'that it was passed without the request, knowledge or consent of the plaintiffs, and that its passage was procured by and in the interest of persons who own a large quantity of ground outside of the assessing district, but within a radius of one mile from the eastern terminus of the avenue' * * * 'and that it was the object of said persons so procuring the passage of said act, to enhance the value of these lands, and to enrich themselves by having this expense saddled on the plaintiffs and other victims in the assessing district, and to make their lands and farms suitable for building

lots;' and the petition alleges that 'they succeeded in their enterprising endeavor.'"

And the court proceed to say:

"But it cannot be denied that if the allegations of the petition hereinbefore quoted, as to the operation and effect of this statute in this respect, and as to the means used to bring about its passage are true, great injustice has been done to the plaintiffs, at least, in this case. Indeed there are strong grounds to believe that special legislation like this, of a purely local character, brought about by the efforts of a few persons financially interested therein, whereby it is made obligatory upon the commissioners of a county to make a certain local improvement, and to assess the cost thereof on property within a certain district or to put the cost upon the general duplicate, is open to very grave objections. But if in addition to this, lands specially benefited, and adjacent to the improvement, are studiously exempted from assessment therefor, and the burden is imposed on others farther removed therefrom, and not so much benefited, such legislation is essentially vicious, and courts will not be eager to enforce a statute open to such objections."

The court, nevertheless, upon the authority of The State *ex rel.* Hibbs *v.* Commissioners, 35 Ohio St., 458, held the law to be constitutional.

26 & 27 This decision sustaining the law was affirmed by the supreme court. No opinion was delivered on behalf of the majority of the supreme court, but Judges Minshall and Spear expressed their dissent as follows:

"It is not competent to the legislature to create an assessment district in a county or township for the making or the improvement of a highway, and require the improvement to be made without any discretion in the local authorities, or the people within the district. The legislature, in our opinion, does not possess such administrative powers. The case of State *ex rel.* Hibbs *v.* The Commissioners of Franklin County, 35 O. S., 458, is bad law and should be overruled." 30 W. L. B., 291.

In State *ex rel.* Archibald *v.* The Trustees of Columbia Township, 8 Ohio Circuit Court Reports, 691, the act in question in the case at bar was under consideration, and the court say:

"It is further objected that the General Assembly has not the right to pass such a statute requiring county commissioners or township trustees, without giving them any discretion in the matter, to construct such an improvement as this, and assess the cost of its construction on abutting property.

"We have had occasion heretofore to express our doubts as to the propriety or expediency of such legislation. But our understanding is that the constitutionality of such acts has been maintained by the decisions of the supreme court in 35 Ohio St., 458, and practically in the Weston case above referred to, decided by that court as reported in 30 Weekly Law Bulletin, 290, affirming the decision of this court in the Erie Avenue case. It is true that the authority of these cases is weakened by the facts that three of the six judges now composing the supreme court have expressly and forcibly

stated in dissenting opinions that such power does not exist, and that the decision in 35th Ohio St., 458, is bad law, and should
28 be overruled. But it has not as yet been overruled by the court, and whatever ground there may be to suppose that when the question is again submitted to it that it may be done, in our judgment, it is not the duty of this court to hold that such legislation is unconstitutional."

In Commissioners *v.* State *ex rel.*, 50 O. S., 653, the act there under consideration was entitled—

"An act to authorize and direct the commissioners of Hamilton county, to widen and improve the Montgomery road from the north corporation line of Cincinnati to the Plainfield road, and for other purposes."

And the court held that—

"That clause of the act which assumes to authorize the councils of the villages of Norwood and Pleasant Ridge to nominate and recommend to the commissioners two freeholders to act as trustees in the making of the contemplated improvement, is an attempt to confer upon such municipalities corporate power, and is in conflict with section 1, of article 13, of the constitution, which provides that, 'the General Assembly shall pass no special act conferring corporate power.'"

Judge Spear, in delivering the opinion, says, on page 658:

"Thus is presented a project for an extensive road improvement to be made under a special law, by county commissioners, without notice to property-owners liable for assessments or opportunity for a hearing, involving an outlay, stated by counsel and not controverted, to amount to $800,000, the work to be of a character usually made by municipalities under authority of general laws, after full notice to those to be affected, and full opportunity to be heard."

Judges Minshall and Burket dissented. Judge Minshall, delivering the dissenting opinion, says:

"I concur in the judgment that the act is invalid on the
29 ground stated in the opinion; and for the further reason, that it is not competent to the legislature to enact a statute by which it is directed that a certain road shall be laid out and improved in a specified manner, and the cost assessed upon the abutting property-holders, without any discretion in the local authorities, or desire on the part of those to be assessed. An act of this kind is not properly a law; it is an order made in the exercise of a power, that is not legislative in character. It belongs under our system of government to administrative officers, such as township trustees, county commissioners, and officers and boards possessing similar functions. * * * It is a usurpation of power not conferred on the legislature and cannot be checked too soon."

It will be seen that all these decisions assume that the right of the legislature to pass such acts was declared by the supreme court in Hibbs *v.* The Commissioners, and they each follow that case, notwithstanding the dissent of a minority of the supreme court and the expression of dissatisfaction by the judges of the circuit court.

All these decisions were rendered prior to the issuing of the bonds sued on in the case at bar.

Since the issuing of these bonds Hibbs *v.* The Commissioners has been reversed. The second paragraph of the syllabus in that case has been reversed by Hixson *v.* Burson, 54 O. S., 470, and the third and fourth paragraphs thereof by State *v.* Commissioners, 54 O. S., 333.

The first paragraph of the syllabus in State *v.* Commissioners reads as follows:

"It is not competent to the General Assembly to authorize the commissioners of a particular county to widen, extend and improve a certain road in a prescribed manner, one-half the cost and expenses to be assessed on lands within a prescribed limit, according
30 to benefits, and the other half to be levied on the general tax-payers of the county, without the request or consent of any of the parties to be assessed. The exercise of such power over the affairs of a county is administrative in character and not legislative; and the act is, for such reason, invalid."

Judge Minshall in delivering the opinion, after stating the grounds upon which the act is held to be invalid, as set forth in the first paragraph of the syllabus, adds:

"There is still another ground on which this statute is, in my opinion, clearly invalid. The location and construction of public roads is a subject of a general nature, and should, therefore, be regulated by general laws, uniform in operation throughout the State. Const., article 2, section 26. And have always until recently been so treated. But as this question is presented in a number of cases now pending in this court, it is not now passed on by the court; nor are my associates in any way bound by what is here said. The points decided are expressed in the syllabus."

In Hixson *v.* Burson the first and second paragraphs of the syllabus read as follows:

"1. Under section 26 of article 2 of the constitution, the constitutionality of an act is determined by the nature of its subject-matter, its operation and effect, and not alone by its form.

"2. The act of May 16, 1894, entitled, 'An act to authorize the county commissioners to provide for the construction, improvement and repair of public highways,' 91 O. L., 759, is unconstitutional in this, that its subject-matter is general, while its operation and effect are local. The second syllabus of State *ex rel.* Hibbs *v.* Commissioners of Franklin County, 35 Ohio St., 458, is overruled."

Under these decisions it is clear that the act of the General Assembly under which the bonds sued on in this case were issued is unconstitutional, and the question now is whether these decisions shall have retroactive effect so as to invalidate the bonds.

31 The law upon this question has been definitely settled by the supreme court in the cases of Douglass *v.* County of Pike, 101 U. S., 677, and Burgess *v.* Seligman, 107 U. S., 20. In Douglass *v.* County of Pike the court say (pages 686, 687), quoting from Rowan *v.* Runnels, 5 How., 134:

"Undoubtedly this court will always feel itself bound to respect

the decisions of the State courts, and, from the time they are made regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made. * * * The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

And in Burgess *v.* Seligman the court say (pages 33, 34) that—

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the State tribunals contrary to that given by the circuit court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory
32 is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without

sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the State courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

See also a decision of the circuit court of appeals of this circuit in Louisville Trust Co. *v.* City of Cincinnati, 76 Fed. Rep., 296, where the doctrine of the case of Burgess *v.* Seligman is applied.

33 Coming to the case at bar, we find that from the time of the decision of the supreme court of Ohio, made in 1880, in the case of Hibbs *v.* The Commissioners, *supra*, that the doctrine that under the constitution of Ohio the General Assembly had power by legislative enactment to require boards of county commissioners and township trustees to improve a designated public road and provide for the expense of the improvement by the levy of a tax or the assessment of the property without the request or consent of the parties to be taxed or assessed, was maintained until the decision of the same court, made in 1896, in the case of State *v.* The Commissioners, *supra*.

It was questioned from time to time, as shown by the cases cited above, but each time the supreme court affirmed the doctrine of Hibbs *v.* The Commissioners, and continued to do so until long after the issuing of the bonds sued on. It was suggested in argument that this question was not decided in the case of Hibbs *v.* The Commissioners. I think it was, but let that be as it may, the courts of the State, common pleas, circuit, and supreme, assumed that it it was, and followed that case as authority for sustaining the constitutionality of acts like the one in question, and the dissenting judges refer to it as authority for the doctrine which they condemned.

The holding of the court in Hibbs *v.* The Commissioners, as set forth in the second paragraph of the syllabus, that—

"An act providing for the improvement of a designated road, is local in its nature, and not in conflict with article 2, section 26, of the constitution, which provides that, 'all laws of a general

34 nature shall have a uniform operation throughout the State,'"

—stood almost without question until the decision in the case of Hixson *v.* Burson, *supra*, which was rendered long after the issuing of the bonds sued on.

I hold, therefore, upon the authority of Douglass *v.* County of Pike and Burgess *v.* Seligman, *supra*, that the recent decisions of the supreme court of Ohio, which declared laws such as the one under consideration to be in conflict with the constitution of Ohio, cannot be given retroactive effect so as to invalidate these bonds, and the demurrer cannot be sustained upon that ground.

Third. Section 3 of the act under consideration provides that—

"The trustees shall receive reasonable compensation for their services, which, * * * with all costs and expenses of constructing said improvement together with the interest on any bonds issued by the trustees for the same, shall be levied and assessed upon each front foot of the lots and lands on each side of said Williams avenue and the termini mentioned in section 1 hereof."

It is claimed that the assessment immediately back on the abutting lands of the entire damages awarded the owners of the abutting lands, together with the costs and expenses of the condemnation proceedings, is the taking of private property without due process of law, contrary to the 14th amendment of the Constitution of the United States.

In answer to this proposition the defendant claims:

1. There is nothing in the act which on its face shows that
35 the assessment against every owner will be greater than the damages awarded him in the condemnation proceedings.

2. That, while the abutting land-owners may complain of the assessment, the township has no right to complain of it, as it is a provision for the benefit of the township as against the abutters.

3. If that part of the act which provides for the assessment should be found to be invalid, yet the remainder of the act would be unaffected thereby, and the debt of the township for the moneys borrowed on the bonds would remain a valid and enforcible obligation against the township.

Taking these claims in inverse order, I do not think the third point can be sustained. The rule is that—

"A statute may be invalid in part by reason of some provision being repugnant to the constitution, and valid as to the residue, where it appears that the invalid part is an independent provision, not in its nature and connection essential to the other parts of the statute, nor so related to the general purpose of the statute as to warrant the conclusion that the legislature would have refused to adopt it with the invalid part stricken out" (Gager *v.* Prout, 48 O. S., 109).

I think it was an essential part of the general purpose of the act in question that the expense of the improvement should be borne by the abutting land-owners, and I do not believe that the legislature would have enacted the law with the assessment clause stricken out. The assessment clause was in line with the general legislative policy, as evidenced by many acts providing for similar improvements passed since 1880. It was a part of the gen-
36 eral purpose of the act to make the improvement at the expense of those presumed to be most benefited thereby, to wit, the abutting land-owners, and it is not to be assumed that the legislature would have passed the law without some special provision requiring them to bear the expense. It cannot be said, therefore, that the assessment clause of this act is separable from the other provisions thereof in the sense that the general purpose of the act could be carried out if that clause were omitted therefrom. Bowles *v.* State, 37 O. S., 35.

If, however, the law should be held to be not in contravention of

the Constitution of the United States if the assessment clause should be held valid, then the failure of the township for any cause to collect the assessment against the abutting lands would not discharge the debt incurred by the township in putting forth these bonds or lessen the obligation of the township to pay it. The payment of the debt, if incurred under a constitutional law, could not be defeated by the failure of the township to realize from the assessment sufficient money with which to pay it. In such an event the township would be required to provide the necessary moneys by a general tax upon all the property of the township. State *v.* Commissioners, 37 O. S., 526.

I do not think the second point made by the defendant is well taken. If the law as a whole be unconstitutional, any one may raise the question. If as a whole it is unconstitutional, it is a nullity; it is not a law, and no one is bound by it (Town *v.* Perkins, 94 U. S., 267).

The first point made by the defendant, that "there is
37 nothing in the act which on its face shows that the assessment against every owner will be greater than the damages awarded him in the condemnation proceedings," is covered by the recent decision of the Supreme Court of the United States in the case of The Village of Norwood *v.* Baker, in which the court say:

"We have seen that by the Revised Statutes of Ohio relating to assessments, that the village of Norwood was authorized to place the cost and expense attending the condemnation of the plaintiff's land for a public street on the general tax-list of the corporation, sec. 2263; but if the village declined to adopt that course, it was required by section 2264 to assess such cost and expense 'on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement;' while by section 2271, whenever any street or avenue was opened, extended, straightened, or widened, the special assessment for the cost and expense, or any part thereof, 'shall be assessed only on the lots and lands bounding and abutting on such part or parts of said street or avenue so improved, and shall include of such lots and lands only to a fair average depth of lots in the neighborhood.' It thus appears that the statute authorizes a special assessment upon the bounding and abutting property by the front foor for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whetcher such property was benefited or not to the extent of such cost.

"It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show nor offer to show by proof that the amount assessed upon her property was in excess of the special benefits accruing to

it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits.

We do not concur in this view. As the pleadings show, the
38 village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

All that is said by the Supreme Court in the Baker case is equally applicable to the case at bar, and upon the ground that the law under which the bonds sued on were issued contravenes the fourteenth amendment to the Constitution of the United States, which provides that private property shall not be taken without due process of law, the demurrer to the petition in this case will be sustained.

39 And afterwards, to wit, on the 13th day of January, A. D. 1899, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry—Journal 5, Page 41.

This cause coming on to be heard upon the demurrer of the defendants herein to the petition, having been argued by counsel, and the court, being fully advised in the premises, upon consideration whereof find- that said demurrer is well taken and sustains the same.

And thereupon, the plaintiff not asking to plead further, the court finds that the plaintiff hath no cause of action nor claim in the premises, and it is ordered by the court that the defendants go hence without day and recover from the plaintiff their costs herein expended; to all of which the plaintiff excepts.

And afterwards, to wit, on the 21st day of April, A. D. 1899, the following petition for writ of error was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Petition for Writ of Error.

40 The Circuit Court of the United States for the Southern District of Ohio, Western Division.

LOUIS LOEB, Plaintiff,
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP, Defendants. } At Law. No. 5099.

Petition for writ of error.

Now comes Louis Loeb, plaintiff herein, and says that on or about the 13th day of January, 1899, this court entered judgment herein in favor of the defendants and against this plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more fully in detail appear from the assignment of errors, which is filed with this petition.

Wherefore plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

J. W. WARRINGTON,
G. HAMMOND AVERY,
Attorneys for Plaintiff.

And afterwards, to wit, on the 21st day of April, A. D. 1899, the following assignment of errors was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Assignment of Errors.

41 The Circuit Court of the United States, Southern District of Ohio, Western Division.

LOUIS LOEB, Plaintiff,
vs.
THE TRUSTEES OF COLUMBIA TOWNSHIP. } At Law. No. 5099.

Assignment of errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

I. The court erred in sustaining the demurrer of defendants to the petition of the plaintiff.

II. The court erred in holding section 3 of the certain statute of the State of Ohio mentioned in the petition and involved in said cause to be in violation of amendment XIV to the Constitution of

the United States, and to be so inseparable from the rest of the said statute as to render the whole act unconstitutional and void.

III. The court erred in holding the certain statute of the State of Ohio mentioned in the petition and involved in said cause to be in violation of amendment XIV to the Constitution of the United States.

IV. The court erred in entering judgment in favor of the defendants and against the plaintiff.

J. W. WARRINGTON,
C. HAMMOND AVERY,
Attorneys for Plaintiff.

42 And afterwards, to wit, on the 21*th* day of April, A. D. 1899, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal 5, Page 156.

Order allowing writ of error.

This 21st day of April, 1899, came the plaintiff, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to b*y* urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court — the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff giving bond, according to law, in the sum of $500, which shall operate as a supersedeas bond.

And afterwards, to wit, on the 22nd day of April, 1899, the following error bond was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Error Bond.

SOUTHERN DISTRICT OF OHIO, *Western Division,* } *ss:*

Circuit Court of the United States.

LOUIS LOEB, Plaintiff,
vs.
43 THE TRUSTEES OF COLUMBIA TP., HAMILTON COUNTY, Ohio.

Know all men by these presents that we, Louis Loeb, as principal, and Albert H. Bloom and Samuel S. Bloom, as *principals*, are held and firmly bound unto The Trustees of Columbia Township, Hamilton County, Ohio, in the sum of five hundred dollars, to be paid to

the said The Trustees of Columbia Township as aforesaid, its assignees and successors in office; to which payment, well and truly to be made, we bond ouselves and each of us, jointly and severally *and severally*, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals; dated this 22nd day of April, 1899.

Whereas the above-named Louis Loeb has taken out a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio, western division:

Now, therefore, the condition of this obligation is such that if the above-named Louis Loeb shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

LOUIS LOEB,
Per C. HAMMOND AVERY, [SEAL.]
His Attorney.
ALBERT H. BLOOM. [SEAL.]
SAMUEL S. BLOOM. [SEAL.]

Sealed and delivered in presence of—
GEO. W. HAYS, JR.
ROB'T C. GEORGI.

The above security is approved.

A. C. THOMPSON,
Judge of the U. S., S. D. O.

44 SOUTHERN DISTRICT OF OHIO, *ss:*

I, Albert H. Bloom, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

ALBERT H. BLOOM.

Sworn to before me the 22nd day of April, 1899.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk, U. S. Circuit Court, S. D. O.*

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Samuel S. Bloom, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

SAMUEL S. BLOOM.

Sworn to before me the 22nd day of April, 1899.

ROB'T C. GEORGI,
[SEAL.] *Deputy Clerk, U. S. Circuit Court, S. D. O.*

45 THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, Western Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States of America within and for the division and district aforesaid, do hereby certify that the foregoing is a full, true, and complete transcript of the proceedings had by and before said court and as the same appears of record and on file in the clerk's office of the court aforesaid.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, Ohio, this 24th day of April, A. D. 1899.

Attest: B. R. COWEN, *Clerk,*

[Seal of the Circuit Court, South'n Dist. of Ohio.]

By JANIE W. T. COWEN,
Deputy Clerk.

46 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Louis Loeb and The Trustees of Columbia Township, Hamilton County, Ohio, a manifest error hath happened, to the great damage of the said Louis Loeb, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the twenty-first day of May next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22d day of April, 1899, in the year of our Lord one thousand eight hundred and ninety-nine.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, S. D. O., W. D. No. 5099. Louis Loeb *vs.* The Trustees of Columbia Township, Hamilton Co., Ohio. Writ of error. Filed April 26th, 1899. B. R. Cowen, clerk.

47 THE UNITED STATES OF AMERICA, *ss:*

To the Trustees of Columbia Township, Hamilton County, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the twenty-first day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Louis Loeb is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 22d day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

A. C. THOMPSON,
United States District Judge, Southern District of Ohio, Sitting & Holding Circuit Court.

48 [Endorsed:] United States circuit court, S. D. O., W. D. No. 5099. Louis Loeb *vs.* The Trustees of Columbia Township, Hamilton Co., O. Citation to defendant- in error. Filed April 26th, 1899. B. R. Cowen, clerk.

We hereby this 26th day of April, 1899, accept due personal service of this citation on behalf of The Trustees of Columbia Township of Hamilton County, Ohio, defendants in error.

BURCH & JOHNSON,
Attorneys for the Trustees of Columbia Township of Hamilton County, Ohio, Defendants in Error.

Endorsed on cover: File No., 17,385. S. Ohio C. C. U. S. Term No., 276. Louis Loeb, plaintiff in error, *vs.* The Trustees of Columbia Township, Hamilton County, Ohio. Filed April 27, 1899.

Office Supreme Court U. S.
FILED
FEB 6 1900
JAMES H. McKENNEY,
Clerk.

No. 276.

Mr. Warrington for P. C.

The Robert Clarke Company, Cincinnati. (January, 1900.

Filed Feb. 6, 1900.

[17,385.]

Supreme Court of the United States.

OCTOBER TERM, 1899.

Louis Loeb,

Plaintiff in Error,

No. 276.] *vs.*

The Trustees of Columbia Township, Hamilton County, Ohio,

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

C. HAMMOND AVERY,
J. W. WARRINGTON,
H. D. PECK,
Counsel for Plaintiff in Error.

[17,385.]

Supreme Court of the United States.

OCTOBER TERM, 1899.

Louis Loeb,

Plaintiff in Error,

No. 276.] *vs.*

The Trustees of Columbia Township, Hamilton County, Ohio,

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On November 4, 1897, the plaintiff, Louis Loeb, filed a petition in the Circuit Court of the United States for the Southern District of Ohio, Western Division, in an action at law against the Trustees of Columbia Township, Hamilton County, Ohio (R. 1.); alleging in substance that he is a citizen and resident of Indiana; that defendant is a citizen and resident of Ohio; that the legislature of Ohio passed a certain act to widen and extend a certain street in said township called Williams avenue; setting out the action of the trustees of the township taken under that act; the execution in due form of certain negotiable coupon bonds of the township and their sale to the highest bidder for $13,325 and

accrued interest, to a *bona fide* purchaser in advance of the making of the improvement, all in accordance with the said act; that plaintiff is the *bona fide* owner and holder for value of said bonds to the amount of $2,500, with certain unpaid coupons thereon; that the bonds matured and were presented for payment, but the township refused to pay, and judgment thereon was accordingly prayed (R. 2 to 9).

The defendant demurred generally to the petition, alleging that it did not state facts sufficient to constitute a cause of action (R. 11).

On January 13, 1899, the following judgment was rendered:

"This cause coming on to be heard upon the demurrer of the defendants herein to the petition, having been argued by counsel, and the court, being fully advised in the premises, upon consideration whereof find that said demurrer is well taken and sustains the same.

And thereupon, the plaintiff not asking to plead further, the court finds that the plaintiff hath no cause of action nor claim in the premises, and it is ordered by the court that the defendants go hence without day and recover from the plaintiff their costs herein expended; to all of which the plaintiff excepts (R. 23).

A question may be raised at the threshold as to whether we are properly in this court. The proceedings in error beginning with the petition for writ of error which are set out on pages 24 to 28 of the record, were filed in this court on April 27, 1899 (R. 28). Like proceedings in the same cause were filed in the United States Circuit Court of Appeals, Sixth Circuit, on June 16, 1899. The reason for so filing proceedings in both of the courts was, that while questions were in fact involved and decided in the cause as the same was tried in the Circuit Court, which entitled the plaintiff in error under section 5 of the Act of Congress creating said Court of Appeals to bring such proceedings in error directly to this court, yet the record does not disclose such questions except

as they arose and appear by the demurrer to the petition and the decision of the District Judge (R. 11 to 23). On October 25, 1899, a motion was granted in the Circuit Court of Appeals, continuing the cause until this court shall take action upon the proceedings brought here.

It is not our purpose at this time to argue the question of whether the plaintiff is rightfully here, because we propose to ask the court for the allowance of a writ of *certiorari* to bring the cause so pending in the Circuit Court of Appeals into this court, and further we understand a similar question arising in the case of *The C. H. & D. Ry. Co., Plaintiff in Error*, v. *Thibaud, Administrator, Defendant in Error*, to have been certified to this court by our Circuit Court of Appeals, which, we assume, will be decided before this cause is reached. It is submitted that the demurrer raised all questions in law, the same as if they had been expressly and formally pleaded, which could be raised against the right of the plaintiff to recover, and that the judgment for defendant upon the demurrer necessarily passed upon those questions.

The opinion of Judge Thompson of the Circuit Court (Record, pp. 14 and 15) shows the points urged in support of the demurrer by defendant—the first two being as follows, viz:

> 1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and if he were an assignee or subsequent holder thereof he was not entitled to maintain the action because the bonds were payable to bearer and were not made by a corporation.
>
> 2. That the act (which we will call the Williams Ave. Act) under which the bonds were issued contravened the Constitution of Ohio.

As to these two points there was full argument orally and by briefs. The opinion of Judge Thompson, on pages 15

to 25 of the record, sets out the argument open to plaintiff so fully that we do not think we can add to it, and therefore beg to refer to it as our argument and briet on those two points.

The defendant in support of the demurrer also claimed that the Williams Avenue Act was wholly void, because the assessment feature of section 3 contravened the 14th Amendment of the Constitution of the United States, by permitting the taking of private property without due process of law.

In answer plaintiff claimed that while the abutting land owners might complain of the assessment, the township had no right to complain, as the provision was for the benefit of the township as against the abutters. But even if the township could complain and the assessment clause in Section 3 were invalid, yet the rest of the act would be unaffected and the debt of the township would remain a valid and enforcible obligation.

These contentions, unlike the two first mentioned, were not argued fully by either side. They were not much more than stated. The decision in *The Village of Norwood* v. *Baker*, 172 U. S., p. 269, had not then been rendered by this court.

The theory on which Judge Thompson reached his decision declaring the act invalid is shown from the following part of his opinion:

(See p. 26 of Record) "I think it was an essential part of the general purpose of the act in question that the expense of the improvement should be borne by the abutting land owners, and I do not believe that the legislature would have enacted the law with the assessment clause stricken out. The assessment clause was in line with the general legislative policy as evidenced by many acts providing for similar improvements passed since 1880—it was part of the general purpose of the act to make the improvement at the expense of those presumed to be most benefited thereby, to wit, the abutting land owners, and it is not to be assumed that the legislature would

have passed the law without some special provision requiring them to bear the expense. It cannot be said, therefore, that the assessment clause of this act is separable from the other provisions thereof in the sense that the general purpose of the act could be carried out if that clause were omitted therefrom."

To uphold the act with the special assessment eliminated will do justice. To invalidate it, on the other had, will work injustice.

Specification of Errors.

The assignments of error are set out in detail at pp. 24 and 25 of the record. Those we wish chiefly to argue in this brief are:

1. That even if section 3 of the Statute of Ohio referred to in the petition be treated as in violation of the Fourteenth Amendment as decided by the court below, yet it was error in that court to hold that the section was not severable from the rest of the act, and so to refuse to treat the other sections providing for the improvement and the bonds to pay for the same as a complete act, without respect to such third section authorizing a special assessment.

2. That the court erred in construing said section 3 to authorize an assessment in excess of benefits and so holding it to be violative of the Fourteenth Amendment and void for that reason.

ARGUMENT.

I.

A contractual obligation of the township to pay its bonds through general taxation arises out of the authority to issue them independently of the provision to levy a special assessment therefor.

The statute in question is to be found in volume 90 of Ohio Local Laws, p. 251. The main purpose of the act was to provide a certain highway; and not to give an opportunity to levy a special assessment. All its provisions are directed toward the acquisition of a highway. The question here to be determined, assuming for the purpose of argument that the provision for the assessment of the cost of the improvement is in violation of the Fourteenth Amendment, is, whether the invalidity of that provision is such as to render the whole act invalid. There is a complete scheme for the accomplishment of the intent of the act if the assessment provision be omitted. Section 1 of the act describes the improvement and the place for its location. Section 2 provides a method for acquiring the land, and section 4 provides for the issue of bonds to raise money to pay for the improvement. Section 3 provides for a special assessment. It is to be observed that the raising of money from the issue and sale of bonds to pay for the expenses of the improvement was intended to precede, and according to the petition in fact did precede, the levying of an assessment; indeed, under the constitution of Ohio the money had to be raised to pay for the appropriation of land before it could be taken for the purpose of the improvement. Necessarily then the intent of the act was to provide for the sale of the bonds before the completion of the proceedings to appropriate the land, and

consequently before the construction thereon of the street improvement itself. The result is that the essential purpose of the act was accomplished before the assessment was thought of; that is, the bonds were issued and sold, the money raised, and the improvement made and paid for prior to the making of the assessment. Our contention is that the scheme and intent of the act accorded with this succession of events, and that the assessment was in no sense an essential part of the main purpose to secure a highway.

It may be urged that the bonds are then outstanding and unpaid, that if no valid assessment can be levied upon the property there is no provision for the payment of the bonds, and that it is not to be presumed that the general assembly would have passed an act without some such provision.

But the bonds to be issued were those of the township; the liability of the township upon them from the moment of their issue was complete unless invalidated by the subsequent failure of the assessment. True, the object of the assessment was to provide a fund to reimburse the township for expenditures or to liquidate the liability which had been incurred. The holder of the bonds is not, however, required or expected to look to the owners of abutting property for the payment of his bonds; he can only look to the township, and can have no remedy against the property holder if the trustees of the township should fail or refuse to levy the assessment. He is the holder of an unconditional promise of the township to pay a certain sum of money at a day certain, with interest at a specified rate payable at fixed intervals. There is no connection, no privity between him and the persons assessed. In short, he has nothing to do with the assessment.

If the assessment fail, there is a method by which the township trustees can raise the money necessary to pay the interest and redeem the bonds, which is by a general levy upon the property of the township. This is the answer to a claim that the legislature would not pass such an act without

some provision for the payment of the bonds. The legislature knew the bonds would be good at the time of their issue and sale. The township was made liable for them in any event, but also believing it to be just that the abutting property should bear the whole or a part of the expenses of improvement, provision was made for an assessment; but to say that this assessment was a necessary part of the scheme to secure the improvement, is to say that the legislature did not realize that the power to issue the bonds in advance was to bind the township no matter whether the assessment was levied and collected or not. The power granted to issue bonds "*of the township*" was sufficient to authorize the creation of a debt of the *quasi corporation*, and the grant of the power to such a body to create an indebtedness necessarily implies the obligation to pay it from the only resource ordinarily open to it—taxation of the property in the township. This has been expressly declared to be the doctrine of Ohio by its Supreme Court. *State* v. *Commissioners*, 37 Ohio St. 526. The statute there authorized county commissioners upon the petition of certain landholders to construct county roads and to levy special assessments to pay for the same; also to issue bonds to raise the money necessary to meet the expenses of the improvements. Section 7 provided, among other things:

"And the said assessment shall be divided in such manner as to meet the payment of principal and interest of said bonds, . . . and when collected, the money arising therefrom shall be applied to no other purpose but the payment of said bonds and interest. . . ." (64 Ohio L. 80.)

Under this act, certain county commissioners upon petition of land owners adopted proceedings for the construction of a county road, issued bonds to pay for same, and levied an assessment. The assessment, however, failed as to certain of the property holders, and the bonds could not be paid in that way for that reason. Suit being brought on the bonds, de-

fense was made that the commissioners could not raise funds by taxation upon all of the property, but were restricted to a levy by way of assessment upon the lands specially benefited. The defense was overruled and the county held liable upon the bonds as an independent debt. McIlvaine, J., in the course of the opinion, at p. 529, said:

"The question of the power of the commissioners to obligate the county, is, however, raised on the statutes to which reference is made in the bond. The holder of the bond is notified by its face, that the power assumed by the commissioners is to be found in these statutes. Section 7 of the statute provides, 'That for the purpose of raising money necessary to meet the expenses of such improvement, the commissioners of the county are hereby authorized to issue *the bonds of the county*, payable in installments, or at intervals not exceeding in all five years, bearing interest at the rate not to exceed seven per cent per annum, payable semi-annually, which bonds shall not be sold for less than their par value.' From the language of the statute here quoted, perhaps no one would deny that the debt evidenced by the authorized bonds is the debt of the county in its *quasi* corporate capacity—indeed, the language is not susceptible of any other meaning; but, inasmuch as the same section provides for an assessment upon the lands specially benefited and lying within two miles of the improvement, to meet the payment of the interest and principal of the bonds, it is contended that no other mode or manner of taxation can be resorted to for the purpose of paying the bonds. However plausible this contention may be, we think it cannot be maintained. That the legislature might have so provided, we do not deny, but if such was the intention, it should have been expressed in very clear and unmistakable terms. Such terms were not used, nor is such inference clear. On the other hand, the liability of the county in its *quasi* corporate capacity is expressed in apt and unmistakable words; and if for such liability a portion only of the taxable property of the county can in any event be taxed, such intent on the part of the legislature should have been expressed in like apt and unmistakable terms. As

between the county and the taxing district created by the statute, to wit, 'the territory within two miles of the road improvement,' it cannot be doubted that the intent of the statute was to impose the burden of the improvement upon the latter; but as to the creditor holding bonds issued to meet the expenses of the improvement, the faith of the county to the extent of all its taxable property was pledged, by the express authority given to the commissioners to issue therefor 'the bonds of the county.' Whenever, therefore, payment of the bonds cannot be provided for, by local assessment under the statute, it is the duty of the commissioners to make provision for their payment, as for the payment of other debts of the county, by a levy upon all the taxable property of the county."

It is true there was no question of constitutionality in that case, but the assessment failed because there was not the requisite number of petitioners for the improvement; see

Hays v. *Jones*, 27 Ohio St. 218;

in other words, because the commissioners had no jurisdiction to proceed with the improvement, yet the court held the county liable upon the bonds for the reasons above stated.

And this court itself, in *United States* v. *Ft. Scott*, 99 U S. 152, held that bonds issued under an ordinance which declared in express language that they should be paid out of special assessments, were nevertheless an independent and collectible debt even though the special assessment fail in whole or in part.

Mr. Justice Harlan (at p. 159) said:

"It is true that sec. 17 declares that 'for the payment of said bonds' assessments shall be made 'upon the taxable property chargeable therewith;' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, the distance improved.' But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode, or that the city will not, under the authority derived from other sections of the

statute, comply with *its* promise to pay the bonds, with interest, at maturity. As between the city and its tax-payers, it was certainly its duty, through the council, to provide, if practicable, payment by taxation upon the property improved, rather than upon all the taxable property within its corporate limits. But the duty to make such distribution of the burden of special improvements did not lessen its obligation, in accordance with its express agreement, to pay the interest and principal of the bonds at maturity. *Hitchcock* v. *Galveston*, 96 U. S. 341."

And further, on the same page, after speaking of the declaration of the ordinance that the principal and interest of the bonds should be paid solely from the special assessments, the learned justice said:

"There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted."

A comparison of the statutes involved in that case and in *State* v. *Commissioners*, *supra*, with the statute in question here, will show a striking similarity of provisions touching the issue of the bonds; especially is this true as between the statute passed on in *State* v. *Commissioners* and the present one.

We cite these cases for the purpose of showing that the power granted the trustees of Columbia Township to issue the bonds of the township, authorized them to create a debt independent of the assessment; and that by virtue of such issue, to paraphrase the language of Judge McIlvaine, the faith of the township to the extent of all its taxable property was pledged by the express authority given to the trustees to issue "the bonds of the township."

Such being the case, it necessarily follows that there was sufficient provision for the payment of the bonds and interest, without regard to the assessment. The two are not interdependent, but separable. The scheme was complete with-

out any assessment, and we therefore most earnestly contend that the legislature cannot be held to have intended that the construction of the improvement should depend wholly upon the assessment. What they were determined upon securing was the avenue; that is shown by the very fact that they made a double provision for the payment of the cost of the improvement.

It is further shown by the imperative language of section 1 of the act authorizing and requiring the trustees to widen and extend Williams avenue. It is also to be remembered in this connection that assessments are notoriously uncertain of collection. The books abound with reports of cases in which they have been held invalid for various reasons, and even when valid, the amount realized from them is often less than the amount required to pay for the improvement, because the property assessed is not of sufficient value to yield the necessary amount. Illustrative of this, see recent decision of Ohio Supreme Court in *Walsh* v. *Barron, Treas.*, 42 Weekly Law Bull. 302. All of this can be fairly presumed to have been known to the legislature; and when that body passed an act imperatively commanding the construction of Williams avenue and the payment of the cost by the sale of obligations of the township, in effect pledging all its taxable property as security for their redemption, with a provision looking to the reimbursement of the township from the proceeds of an assessment, we submit that it cannot be fairly held that the legislature would not have passed the act if this latter feature had been omitted.

This is manifest, too, from the decisions above referred to, which show that the failure of the assessment does not invalidate the bonds. It is to be presumed that the legislature knew this to be the law when they passed the act in question.

To the suggestion made in the decision of the court below in support of its ruling that the assessment was an essen-

tial part of the act and so prevented severability, that the assessment clause was "in line with the general legislative policy, as evidenced by the many acts providing for similar improvements passed since 1880," there are several answers. In the first place, as said in *Hadden* v. *Collector*, 5 Wall., at page 107:

"What is termed the policy of the government with reference to any particular legislation, is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes."

In the next place, the policy of providing for township or county road improvements without provision for special assessments, is declared by a number of general statutory provisions of Ohio, notably R. S. sec. 4677 (Bates' Ohio Statutes):

"The trustees shall, at their next meeting, cause a report to be read, and if the same be in favor of establishing the road and the trustees deem it reasonable and just, they being satisfied that the compensation and damages, if any have been claimed and assessed, are just and equitable, and that the road would be of sufficient importance to the public to cause the same to be paid by the township, they shall order the same to be paid to the person or persons entitled thereto from the township treasury, but if in the opinion of said trustees, the road is not of sufficient importance to the public to cause the same to be paid by the township, they may refuse to establish such road unless the compensation and damages which have been allowed and assessed, are paid by the petitioner, or said trustees may, in their discretion order a portion of such compensation and damages to be paid out of the township treasury and require the petitioner to pay the remainder thereof before such road is opened."

See also sections 2829, 4686–18.

It is fair to assume that the legislature intended the special assessment clause to be incidental, for if it had meant that it should be essential it would have used language mak-

ing the obligation of the bonds depend on the collection of the necessary amount from special assessment, but it does not expressly or by implication say that the bonds shall not be paid unless the assessments are collected. Having used language which can clearly be held to make a township obligation independent of the special assessment, the legislature manifestly intended it to have that effect. Having made provisions complete and capable of enforcement without the special assessment clause, it seems certain that it was intended that these provisions were to be enforced, if necessary, independent of the special assessment clause. The provision might have been that the assessment should be the sole source and means of payment; but unmistakable language would be required to justify a construction at once so unusual and harsh.

Act severable.

If the decisions before cited are apposite, if our contention thus far is at all correct, it inevitably follows that the statute is severable in the sense that the assessment provision may be eliminated and the rest of the act enforced in accordance with the main purpose of the legislature.

The rule on this subject is too well established in this court to justify, much less require, elaboration.

In *Supervisors* v. *Stanley*, 105 U. S. 305, at page 312, Mr. Justice Miller said on this subject:

"The general proposition must be conceded, that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be discarded.

In *Railroad Companies* v. *Schutte* (103 U. S. 118), decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the court. 'It is contended,' said the court, 'that as the provision of the act in respect to the execution and exchange

of the state bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fall. We do not so understand the law.' And yet this was a case in which the scheme of exchanging the bonds of the state for the bonds of the company, in order that the company might get the benefit of the better credit of the state, was accompanied by a mortgage created alone by the statute in favor of the state as her security; and the court, while holding that the exchange of bonds was void, as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid."

In *Baldwin* v. *Franks*, 120 U. S. 678, at p. 689, Mr. Chief-Justice Waite, speaking of an effort in *Presser* v. *Illinois* to invalidate the whole Military Code because of the alleged invalidity of two of its sections, said:

"But the court held that, even if the first two sections of the code, on which the objection rested, were invalid, they were easily separable from the rest which could be maintained. The objectionable sections related to the enrollment of the militia in the state generally, and the rest to the organization of eight thousand men as a 'volunteer active militia.' This evidently brought that case within the rule which controls the determination of this class of questions, that the constitutional part of a statute may be enforced and the unconstitutional part rejected, 'where the parts are so distinctly separable that each can stand alone, and where the court is able to see and declare that the intention of the legislature was that the part pronounced valid should be enforcible, even though the other part should fail.'"

The rule in Ohio is stated in *Treasurer* v. *Bank*, 47 Ohio St. 503, at 523, to be as follows:

The question arises, however, whether, if that portion of the section is declared wholly or in part unconstitutional and void, it may not result in invalidating the entire section. As one section of a statute may be repugnant to the constitution without rendering the whole act void, so, one provision of a

section may be invalid by reason of its not conforming to the constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject-matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for, the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

Bowles v. *State*, 37 Ohio St. 35, at p. 44.

In the last citation the Ohio Supreme Court approved of the rule as stated by Judge Cooley in his work on Constitutional Limitations, 6th ed., 211 :

"If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

The presumption of validity attaches to every part of a statute, and therefore if any part be invalid the presumption remains as to the rest, unless it be shown to be so connected with the invalid part that the former cannot stand.

In the present case the intent of the legislature to cause the improvement to be made, can be completely carried out, if the portion alleged to be unconstitutional be stricken from the act. In that case the improvement can be made and paid for; indeed this has been done. It is no answer to say that the legislative intent to assess the cost upon the property holders cannot be carried out, for the assessment was only furnished as one of the means to the end to be accomplished; and the legislature was so anxious to attain the result that the two ways of paying for the improvement were provided so that there could be no failure.

II.

Section 3 of present act only describes the property to be assessed—it does not provide a mode of assessment or that its amount shall exceed the special benefits. Its true construction is that it confers power to assess, but only to the extent of the benefits conferred, and this is the established rule of Ohio. The section is therefore valid. The record being silent as to assessments, there is nothing to show that one has ever been made, much less that it is in excess of benefits or that any one except the township would contest it.

In discussing this feature of the case we shall not overlook the recent decisions of the Ohio Supreme Court which in substance hold that mandatory provisions such as are found in the statute in question invalidate it.

State ex. rel. v. *Commissioners*, 54 Ohio St. 333.
Hixson v. *Burson*, 54 Ohio St. 470, 485.
State ex rel. v. *Davis*, 55 Ohio St., 15 at 18.

But the bonds in dispute were issued prior to any of those decisions. They were issued and sold September 29, 1894 (R. 2). The first of the decisions just cited was rendered March 31, 1896, the second one April 28, 1896, and the third one June 23, 1896 (see Ohio State Reports aforesaid).

Yet as early as the year 1880 the Supreme Court of Ohio determined the rule respecting mandatory provisions exactly the reverse of the rule laid down in the decisions just cited.

The State ex rel. v. *Commissioners*, 35 Ohio St. 458.
Kumler v. *Silsbee*, 38 Ohio St. 445 at 447, former case approved.

It is scarcely necessary to say in this court that this change of decision by the court of last resort of Ohio did not

affect the validity of these bonds; for they were issued and purchased, and rightfully so, on the faith of the original rule.

Douglass v. *County of Pike*, 101 U. S. 677.
Burgess v. *Seligman*, 107 U. S. 20.
Greene County v. *Conness*, 109 U. S. 104.
Anderson v. *Santa Anna*, 116 U. S. 356.
Rowan v. *Runnells*, 5 How. 134.
Louisville Trust Co. v. *City of Cincinnati*, 76 Fed. 296.

Following these decisions, the court below held, against the objection of defendant, that the bonds could not be invalidated by reason of such overruling of the earlier doctrine of the Ohio Supreme Court (R. 18, 20).

We are thus brought to the question of interpretation of section 3 of the act in dispute. The court below construed it to be in violation of the Fourteenth Amendment, relying upon *Norwood* v. *Baker*, 172 U. S. 269. The material portion of section 3 is this:

"The trustees shall receive reasonable compensation for their services, which shall not exceed the sum of twenty-five dollars each, which, with all costs and expense of constructing said improvement, together with the interest on any bonds issued by the trustees for the same, shall be levied and assessed upon each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned in section one (1) hereof, and shall be a lien from the date of the assessment upon the respective lots or parcels of lands assessed;" (90 Ohio Local Laws, 251).

Our contention is that the words "assessed upon each front foot of the lots and lands" merely describe the lands upon which an assessment shall be levied; and that they do not provide a mode of assessment or that its amount may exceed the special benefits the improvement confers. Our meaning can perhaps be more clearly displayed by contrasting this provision with the one which was construed

in *Norwood* v. *Baker*. The language of the law there construed—R. S., sec. 2264 (172 U. S. 272)—is that the assessment shall be "on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation either in proportion to the benefits which may result from the improvement or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement." This both described the property to be assessed and provided three modes for making the assessment. Where the last mode is adopted, as it was in the *Norwood* case, the difficulty arises which is pointed out in the majority opinion in that case. But the present act provides for an assessment only by defining the lands to be assessed, to wit, "upon each front foot of the lots and lands abutting." It does not enact that the assessment shall be by a uniform rate or that any land shall be assessed beyond the special benefits it derives from the improvement; it merely declares that each front foot shall be assessed. Assessed how? Assessed to what extent? We maintain that the land being thus pointed out, the assessment thereon shall be according to the fundamental rules and principles of local special assessments.

The Supreme Court of Ohio has again recently laid down the rule in this behalf. The case arose under statutes which display the point of our contention in a very clear way. On May 11, 1886, the General Assembly of Ohio passed an act authorizing certain improvements of streets and alleys to be made in cities of a certain class, and to levy assessments to pay therefor (83 Ohio Laws, 140). At that time section 2270 of the Revised Statutes limited assessments to twenty-five per cent of the value of the property as returned for taxation. But on March 21, 1887, another act was passed expressly providing that section 2270 should not apply to any improvement made under the act aforesaid of May 11, 1886. In passing upon the validity of an assessment which

was levied to pay for improvements made under this legislation, the Supreme Court of Ohio, in *Walsh* v. *Barron, Treasurer* (42 Weekly Law Bull. 302), unanimously declared, as appears by the syllabi prepared by the court, as follows:

"1. The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property.

"2. The amendment to the Taylor law by which the provision of section 2270, Revised Statutes, limiting assessments to 25 per cent of the value of the property as returned for taxation, is made not to apply to improvements under that law, cannot be construed to confer an unlimited power of assessment on the municipality in proceedings under the law. The power is still subject to the general principle which underlies all assessments for local improvements; and when an assessment is made in substantial excess of the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles."

In the course of the opinion Minshall, J., said of the amendment which in terms rendered section 2270 inapplicable, and so induced the claim that the city council could assess to any extent it chose (pp. 305 and 306):

"It is fair to presume that in removing the limitation of this section, it was not the intention of the legislature to permit the city to disregard the fundamental principle which limits an assessment for benefits to the extent of the benefits conferred by the improvement on the land. There is no provision of the law which would indicate this. It must, therefore, be held that all assessments under this law must be limited to the benefits conferred, or it must follow that the legislature designed a palpable invasion of the rights of pri-

vate property, which is not admissible. In other words, in authorizing an assessment to pay for improvements under the law, the legislature had special reference to such assessments as would be no more than the proper proportion of the costs based on the benefits received.

The judgments must be reversed and cause remanded for further proceeding. And here it is proper to say, that if the facts stated in the pleading of Walsh are found to be true, the city is entitled to have a sum assessed upon each lot substantially equivalent to the special benefits conferred on it by the improvements, unless such sum has already been paid. In ascertaining this sum, the special benefits conferred on each lot as distinguished from those common to the public, are alone to be considered."

See also *Schroder* v. *Overman, Clerk, et al.*, 42 Weekly Law Bull. 296.

It will not escape observation that these decisions were made after the decision was rendered by this court in *Norwood* v. *Baker*, *supra*, and with express approval thereof. (Id., at p. 305.) It is proper to say, however, that substantially the same rule had been established by the same court long before.

Chamberlain v. *Cleveland*, 34 Ohio St. 551.

Raymond v. *Cleveland*, 42 Ohio St. 522.

It is to be observed that this fundamental rule of assessment according to benefits found expression long ago in an enactment of the General Assembly of Ohio, which must be read in connection with the power of assessment wherever created, in these words:

"And so far as practicable under the provisions of this title, regard must be had, in making special assessments, to the probable benefits to the property assessed." (R. S., sec. 2283.)

It is true that a play can be made upon mere words when severed from their connecting words or sentences, so as plausibly to urge that there is no distinction between the

words "by the front foot" and "upon each front foot;" yet the former words used in connection with the other language of the statute containing them (O. R. S., sec. 2264) have no function to perform except to describe a *mode* of assessment; whereas the words of the act now in dispute have no office to fulfill except to describe the *lands* upon which an assessment shall be made. When this difference is coupled with the recent decision in *Walsh* v. *Barron, Treasurer, supra*, not to speak of the other decisions, it seems to us manifest that the Supreme Court of Ohio, having only this question before it, would limit the amount of any assessment to the benefits conferred, and so sustain and not invalidate the act. This would leave the power to assess intact, and would only regulate the mode of its exercise. Plainly this relieves the present act from the criticism that private property could be taken under it without due process of law. The decision of the court below did not take these views of the act into consideration. It treated the decision in *Norwood* v. *Baker* as controlling.

There is still another distinction between the two cases. In the *Norwood* case a property owner was resisting an assessment against him and his property. In the present case no facts appeared to show that an assessment had ever been levied, much less resisted. No property holder is a party to the present case, or, so far as the facts appear, has ever objected to paying an assessment if one has been or shall be levied. When this case was argued the decision in the *Norwood* case had not been rendered; there was therefore no opportunity to call the court's attention to these distinctions. The point was urged, however, by plaintiff against defendant's objection in this behalf that it was no concern of Columbia township in this case whether a valid assessment could be made or not; that the assessment provision was for the especial benefit of the defendant and consequently pre-

sented a question which an objecting property holder alone could raise in a proper case.

We therefore maintain that the court below erred in holding the assessment provision to be invalid. If we are right in this, we scarcely need say that the decision below should be reversed upon this ground alone; for if the assessment provision be valid, the bonds also are valid, no matter whether an assessment has been levied and collected either in whole or in part or at all.

More than this, if we rightly interpret the decision in *Norwood* v. *Baker*, the statute under which the assessment was levied was not declared invalid, but merely the assessment. The judgment of this court affirmed that of the Circuit Court and the latter only enjoined the village from enforcing the particular assessment (172 U. S., at 271). The judgment of this court (at p. 279) affirmed the judgment below "upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits," etc.

Mr. Justice Harlan, at p. 293, said:

"It should be observed that the decree did not relieve the abutting property from liability for such amount as could be properly assessed against it. Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question." (See further on that page and on p. 294.)

The result of that decision, as well as the one rendered recently by the Supreme Court of Ohio in *Walsh* v. *Barron, Treasurer*, not to speak again of the other kindred Ohio decisions, seems to us to be that the courts would apply to the statute in dispute that rule of construction which would harmonize it with the Fourteenth Amendment and not bring it into conflict with it. It is settled that where a statute is open to two constructions, one of which is opposed to a constitutional provision and the other in harmony with it, the

latter will be adopted. As said by Mr. Justice Harlan respecting the construction of a statute, in *Grenada County Supervisors* v. *Brogden*, 112 U. S. 261, at p. 268:

"It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction, which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution."

In *United States* v. *Coombs*, 12 Pet. 72, at p. 75, Mr. Justice Story said:

"If the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous."

Parsons v. *Bedford*, 3 Pet. 433.

Hobbs, Assignee v. *McLean*, 117 U. S. 567.

United States v. *Cent. Pac. R. R. Co.*, 118 U. S. 235.

Burt v. *Rattle*, 31 Ohio St. 116.

State ex rel v. *City of Hamilton*, 47 Ohio St. 52, at p. 86.

Respectfully submitted,

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Counsel for Plaintiff in Error.

[The Robert Clarke Company, Cincinnati.] [April, 1900.

(17,385.)

Supreme Court of the United States.

OCTOBER TERM, 1899, No. 276.

Louis Loeb,

Plaintiff in Error,

vs.

The Trustees of Columbia Township, Hamilton County, Ohio.

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Brief for Plaintiff in Error on Question of Jurisdiction and in Reply to Defendant's Brief on Merits.

I.

Has this court jurisdiction of the cause through the writ of error sued out from this court direct to the circuit court?

A federal question proper and sufficient to require the question to be answered in the affirmative under section 5 of the court of appeals act was in truth presented and decided in the circuit court. The dispute is whether the question is sufficiently disclosed by the record. The question and the opinion upon it of the court below appear in its decision. The question as there stated by the district judge is:

"That said act (the Ohio statute set out in the petition) contravenes the provisions of the constitution of the United States, and that therefore the bonds are invalid" (R. 12, 21, 23).

Our claim is that the pleadings disclose three grounds of federal jurisdiction. One is diversity of citizenship. The others are (1) that the right of the plaintiff in error to recover upon the bonds sued on under the statute of Ohio, which is set out in the petition, involved by necessary intendment the construction and application of the constitution of the United States; and (2) by the demurrer to the petition the validity of this statute is challenged by defendants and is so claimed by them to be in contravention of the constitution of the United States (Sec. 5, court of appeals act). We admit that we had no right to take the writ of error from this court under the first of these grounds; we maintain, however, that we had a perfect right to do so on either of the other grounds.

The petition states the citizenship and residence of plaintiff in error to be in the State of Indiana, and that of defendants in the State of Ohio (R. 1). It next refers to a statute of Ohio passed April 27, 1893, giving its title and reference to the volume and pages thereof in which it is to be found. It then recites all the sections but one of the act (R. 1 and 2). This act authorized the issuing of certain bonds to pay for an improvement it describes. It is alleged that the act was complied with and the bonds duly issued (R. 2). Then follow allegations of ownership of the bonds which are themselves specifically set forth, and judgment with interest on each duly prayed (R. 3 to 7). Like allegations and recitals concerning the coupons follow (R. 7–9).

To this petition the defendant in error demurred as follows:

"Now comes the defendant and demurs to the several

causes of action in the petition of plaintiff herein, for the reason that the same do not state facts sufficient to constitute a cause of action against the plaintiff" (R. 11.)

In considering these pleadings and their necessary purpose and effect of presenting the federal question stated, it will not escape observation that if the act had not been specially pleaded, it is of such a character that the court would take judicial notice of it.

Lamar v. *Micou*, 114 U. S. 218, at 223.
Lloyd v. *Matthews*, 155 U. S. 222, at 227.
Beaty v. *Knowler's Lessee*, 4 Pet. 154, at 167.

There must then have been some object of plaintiff in pleading the act other than a convenient showing of the authority under which the bonds sued on were issued. Reasonable interpretation must signify that the pleader submits and relies upon the law as a warrant under not alone the state constiution, but the federal constitution, for the issuance of the bonds; he could not do so more certainly if he were to declare his object in express words. The action was at law, and was therefore to be conformed as nearly as might be with the mode of pleading in Ohio. (Sec. 914 U. S. Rev. Stat.) The statute of Ohio (R. S., sec. 5096) provides that "the allegations of a pleading shall be liberally construed."

Crooks v. *Finney*, 39 Ohio St. 58.
McCurdy v. *Baughman*, 43 Ohio St. 78.

A comparison between the law so pleaded and the requirements not only of the state constitution but of the federal constitution is thus tendered; also a claim of right to recover under this test. The allegation of ownership and demand, and refusal of payment and the prayer (R. 3, 4, 5 and 9) in respect of bonds issued under the law so pleaded, necessarily asks the federal court to construe the law under the federal constitution. We maintain, therefore, that con-

sidering the petition *alone*, it presents a "case that involves the construction or application of the constitution of the United States," within the meaning of section 5 of the court of appeals act. No other reason can be assigned for setting out the statute at all, for the Ohio decisions, as we shall show later, sanctioned the statute and the issue of such bonds at the time of their issue.

We are entitled to add to this ground the purpose and effect of the demurrer. It alleges that the petition does not "state facts sufficient to constitute a cause of action against this defendant" (R. 11). It is true that this is a challenge of the legal sufficiency of the petition as an entirety. It is also true that it is a challenge, under the federal constitution, of the validity of the law so pleaded. Hence, we also maintain that the case is "one in which the . . . law of a state is claimed to be in contravention of the constitution of the United States," within the meaning of section 5 of the court of appeals act.

The plaintiff sued out a writ of error from this court upon the grounds so stated in our contention. (See petition for writ of error, and, as part thereof, the accompanying assignments of error, R. 24.)

Holder v. *Aultman*, 169 U. S. 81, sustains these claims, and also sanctions the taking of the writ of error from this court direct to the circuit court.

Diversity of citizenship was the ground of invoking jurisdiction of the circuit court of the United States for Michigan. The declaration contained a count on a contract between the parties and also the common counts. Defendant relied on a statute of Michigan, and alleged that the contract sued on was made and to be performed in violation of the statute, and was void for that reason. Plaintiff recovered judgment. Defendant sued out a writ of error from this court, on the ground that the case was one in which a law of a state was claimed to be in contravention of the constitution

of the United States, within section 5 of the act of March 3, 1891.

Upon this record, Mr. Justice Gray, at p. 88, said:

"This was, therefore, . . . rightly brought directly to this court by writ of error under the act of March 3, 1891, c. 517, sec. 5, 26 Stat. 828. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S. 231, 238; *Penn Ins. Co.* v. *Austin*, 168 U. S. 685."

Penn Mutual Life Ins. Co. v. *Austin*, 168 U. S. 685, is another authority in favor of our contention. Both diverse citizenship and impairment of contract by statute and ordinance were alleged. Demurrer was sustained. Appeal was direct to this court. Objection was made that the appeal should have been had in the circuit court of appeals. To this Mr. Justice White answered, at p. 694:

"The argument by which it is sought to support the contention that a right to review the case by direct appeal does not exist, not only disregards the letter of the statute, but is unsound in reason."

At p. 695:

"But the words of the statute, which empower this court to review directly the action of the circuit court, are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the federal constitution."

There are several features of these decisions which merit especial observation. One is that diversity of citizenship was not allowed to prevent this court from taking ju-

risdiction under sec. 5 of the act of March 3, 1891, where another ground under the section appeared either in the petition or *the answer*. This is quite significant, since in *Holder* v. *Aultman*, citizenship is made the basis of jurisdiction in the declaration, and the statute which was claimed by plaintiff to be in contravention of the federal constitution was set up in the answer, not in the declaration. The logic of those decisions is that the circuit court of appeals cannot take jurisdiction of such a case; for under section 5 of the act of March 3, 1891, this court alone is given jurisdiction.

It may not be improper to call attention here to the practice in the circuit courts of appeal in cases involving questions under section 5 of said act of March 3, 1891. In *Davis* v. *Burke*, 97 Fed.., at p. 502, it is said:

"The circuit courts of appeals, so far as they have construed these provisions, have uniformly denied their own jurisdiction of appeals and writs of error in cases which involved the construction or the application of the federal constitution. *The City of Macon* v. *Georgia Packing Co.*, 9 C. C. A. 262, 60 Fed. 781; *Railroad Co.* v. *Adams*, 35 C. C. A. 635, 93 Fed. 852; *Wrightman* v. *Boone Co.*, 31 C. C. A. 570, 88 Fed. 435; *Hastings* v. *Ames*, 15 C. C. A. 628, 68 Fed. 726; *Pauley Jail Bldg. & Mfg. Co.* v. *Crawford Co.*, 28 C. C. A. 579, 84 Fed. 942; *Barr* v. *City of New Brunswick*, 19 C. C. A. 71, 72 Fed. 689. The objection to the jurisdiction of this court must be sustained, and the appeal will be dismissed."

Illinois Central R. Co. v. *Adams Cent. R. Co.*, 93 Fed. 852, at 856.

In re Aspinwall's Estate, 90 Fed. 675.

Hamilton v. *Brown*, 53 Fed. 753.

C. M. & St. P. Ry. Co. v. *Evans*, 58 Fed. 433.

Again, jurisdiction under said section 5, unlike a case coming from the highest court of a state, does not depend upon whether the right claimed is upheld or denied. Still

another point of the decisions is that jurisdiction under said said section 5 "is not limited to the constitutional question, but includes the whole case." And in *Holder* v. *Aultman*, where this language was used, the court did not find it necessary to pass on the ground under which alone it acquired jurisdiction.

See also *Penn. Ins. Co.* v. *Austin*, *supra*, at p. 695; also *Scott* v. *Donald*, 165 U. S., at 72, where Mr. Justice Shiras said:

"As the case is before us, in a case in which the law of a state is claimed to be in contravention of the constitution of the United States, under another clause of the statute, we have jurisdiction of the entire case and of all questions involved in it. *Horner* v. *United States*, 143 U. S. 570; *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 181; *Chappell* v. *United States*, 160 U. S. 499.

It follows that when a case falls within any of the six specified classes of section 5 of the judiciary act of March 3, 1891, a writ of error or an appeal may be taken directly from the circuit court to this court, no matter whether other questions are involved upon which the case might have been decided or not.

Analogy drawn from rule in respect of cases from highest courts of states.

In *Borgmeyer, administrator*, v. *Idler*, 159 U. S. 408, at 414 (to which we shall again refer), Mr. Chief Justice Fuller, in alluding to the analogy between the requisites of records of cases sought to be brought to this court from inferior federal courts and those of the records of state courts attempted to be brought here, said:

"The point was long ago settled in principle upon the record of a suit in a state court."

Furman v. *Nichol*, 8 Wall. 44, involved a record which in principle is analogous to the present one. The question de-

cided arose upon a petition for mandamus which set forth the charter of a bank and particularly the provisions of one of its sections, according to which it was alleged that certain bank notes had been properly issued and plaintiff had become the owner thereof, but that a county clerk refused to accept the notes in payment of taxes in violation of the contract involved with the people of the state under the bank charter. The county clerk demurred. The court of original jurisdiction overruled the demurrer, but the supreme court of the state reversed the decision. Nothing was expressly stated in the petition or the demurrer or in the judgment to indicate that a federal question was made. Mr. B. R. Curtis, on behalf of apellants, after citing the case of *Bridge proprietors* v. *Hoboken Company* (1 Wall. 143), said (at p. 49):

"If any one will observe the character of the petition and of the demurrer, it will be as obvious without argument as with it, that the question raised and decided was, by necessary intendment, none other than the constitutionality of the act of repeal, as against the plaintiffs, in violation of the contract with the state to receive the notes for taxes, and the decision in favor of its validity."

Messrs. Maynard and Harrison, *contra*, argued at p. 51:

"It is nowhere averred in the petition, as it ought to have been in order to bring the case within the twenty-fifth section, that the state had passed a law impairing the obligation of a contract. Nor can this be inferred by any necessary intendment from the record. The court below does not assign any reasons why it sustained the demurrer," etc.

Mr. Justice Davis, at p. 56, said:

"If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the state court

erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did.

Testing the case at bar by these rules, it is apparent that it is properly here, and must be disposed of on its merits."

Water Power Co. v. *Street Ry. Co.*, 172 U. S. 475, came to this court on error to the Supreme Court of South Carolina. It was moved to dismiss the writ of error upon the ground that no federal question was involved, and even if there were, it was not "specially set up and claimed" in the state court, as required by the Revised Statutes. No mention was made of the federal constitution in the complaint, and the theory of the plaintiff's case had to be ascertained by reference to the answer. Mr. Justice Brown, at p. 485, said:

"The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same, is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent state action appears on the face of the pleadings."

After pointing out, at p. 488, the distinction between the several classes of cases which can be brought from a state supreme court to this court, and showing that only in the third class it is necessary that the "title, right, privilege or immunity" must be "specially set up and claimed," the learned justice, proceeding to hold that the case was properly brought to this court, said:

"But where . . . the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact

that it was not specially set up and claimed is not conclusive against a review of such question here."

Telluride Power Transmission Co. v. *Rio Grande Ry. Co.*, 20 Sup. Ct. Rep. (Feb. 1, 1900), 245, at p. 248, right column, lays down the rule in the same language as that above quoted.

The only possible way in which the rule established by these decisions and those cited in them could be escaped, would be to show that the case could have been determined without deciding the question upon which we rely. The only possible way of doing this would be to show either that the circuit court had no jurisdiction, or that the statute in question was not only invalid under the state constitution at the time the decision was rendered in the court below, but that such invalidity would have been declared in the state court at the time of the issue and sale of the bonds. The defendant in error, indeed, sought to carry both of these points in the court below, but failed (R. 12). The district judge stated two of the points thus made in support of the demurrer, as follows:

"I. The petition does not show that the plaintiff, Louis Loeb, is the original holder of the bonds sued on, and if he be an assignee or subsequent holder thereof he is not entitled to maintain this action, because the bonds were payable to bearer and were not made by a corporation.

II. That the act of the General Assembly of the State of Ohio, under and by virtue of which the bonds were issued, contravenes the provisions of the constitution of the State of Ohio, and that therefore the bonds are invalid." (*Ib.*)

The theory upon which the first point was urged was that Columbia township is not a corporation within the meaning of the act of Congress (1 Supp. 612), which in substance provides that no circuit court shall take cognizance of a suit involving a chose in action in favor of an assignee or any subsequent holder, if the instrument be payable to

bearer "and be not made by any corporation, unless such suit might have been prosecuted in such court . . . if no assignment . . . had been made." But section 1376, R. S. O., provides that:

"Every civil township heretofore or hereafter lawfully laid off and designated, is declared to be and is hereby constituted a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conferred upon it by law; it shall be capable of suing and being sued, pleading and being impleaded."

In *Lane* v. *The State*, 39 Ohio St. 312, at 314, it is said that under this section "townships are corporations."

Harding v. *Trustees of New Haven Tp.*, 3 Ohio, 227, at 330–1.

Howard v. *Wheatstone Township*, 10 Ohio, 365 at 369.

This we submit is sufficient to bring townships within the meaning of the words "any corporation" as used in the act of Congress aforesaid of August 13, 1888 (1 Supp. 612).

Lincoln Co. v. *Luning*, 133 U. S. 529.

It is true that in *Brattleboro Sav. Bank* v. *Board of Trustees*, 98 Fed. 524, Judge Taft has recently said that the statute declaring townships to be corporations is not sufficient to bring them within the provision of sec. 1, art. 13, of the constitution of Ohio, forbidding the general assembly to pass a special act conferring corporate power; but this was on the theory that townships were not within the evils which the history of private corporations and municipalities reveals as the cause for adopting that constitutional provision. He does not hold that a township is not a coporation for some purposes. The statute declares it to be a corporation "for the purpose of enjoying and exercising the rights and privileges conferred upon it by law." The right and privilege of issuing the bonds in dispute were conferred by law, and

the township corporation must be treated in this case as having been erected into a coporation for that purpose at least. *State* v. *Comrs.*, 37 Ohio St. 526, 1*st syl.*

Apart from this, there are two objections to the point which deserve a moment's notice. One is that since there is nothing to show that the bonds were ever assigned to any one or that plaintiff in error is a "subsequent holder" within the meaning of the act of Congress, it follows that he must be treated as the person to whom the bonds were *directly issued*, despite the rule that where assignments or subsequent ownership appear, affirmative allegations as to the residence of the assignor or former owner are required. The other is that the question so made goes to the jurisdiction of the circuit court, and under sec. 5 of the court of appeals act, such questions "shall be certified to the supreme court from the court below for decision."

As regards the second point made in support of the demurrer, while it is true that recent decisions of the Supreme Court of Ohio render the statute set out in the petition invalid, yet at the time these bonds were issued the very reverse of the rule recently laid down was the established doctrine of Ohio. (See our original brief, pp. 17, 18.) We scarcely need say that this change of decision by the Supreme Court of Ohio could not affect the validity of these bonds.

It therefore follows from what has been shown, that the court below could not have reached its decision without holding, as in truth it did hold, that the statute set out in the petition contravenes the fourteenth amendment to the constitution of the United States. Every other point was decided in favor of the plaintiff in error. The case then as made upon the pleadings alone falls within the decisions of this court before cited, which hold that the questions disclosed by the pleading vest jurisdiction.

Pleadings present a definite issue as to validity of statute under federal constitution.

We may safely go further. The pleadings present under the federal constitution *an issue* as to the validity of the statute set forth in the petition. Analysis of the petition and demurrer discloses this issue as certainly as if the parties had said in words that each relied on the fourteenth amendment—the plaintiff to sustain the act, and the defendant to destroy it. Do we have to resort to the alphabet to have an issue of this kind displayed? The court has had occasion to speak plainly at times when it was apparent that no federal question had in truth been presented or decided in the court below. The language used in decisions rendered in such cases could not have been intended for records like the present one. Sentences extracted from those decisions and isolated from the circumstances under which they were formed, are a fertile source for argument by general definitions. But such arguments are artificial. They might be misleading in a court that did not know they were torn from their surroundings and both misapprehended and misapplied.

To illustrate: In *Ansbro* v. *United States*, 159 U. S. 695, Mr. Chief Justice Fuller, after vainly searching through all sorts of papers for an alleged federal question, said: "But we cannot find that any constitutional question was raised at the trial." And, at p. 698, he further stated that "a definite issue . . . must be completely deducible from the record," holding that an assignment of errors "can not be availed of to import questions into a cause."

Cornell v. *Green*, 163 U. S. 75, was another case in which the first suggestion of a federal question appeared in the assignment of errors; approving the language of the learned chief justice above quoted, Mr. Justice Gray, at p. 78, used language which we submit clearly supports the present writ of error:

"But, in order to bring a case within this clause of the act (the judiciary act of March 3, 1891), the circuit court must have construed the constitution, or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it."

In *Muse* v. *Arlington Hotel Co.*, 168 U. S. 430, it was claimed that a treaty was involved, but Mr. Chief Justice Fuller, in the closing sentence of the opinion, said: "The construction of the treaty was not drawn in question in any manner." The approval there given of the decisions above alluded to must consequently be read with reference to this fact. This is also true of the statement made at page 436: "And it is settled that, in order to give the circuit court jurisdiction of a case as so arising, that it does so arise must appear from the plaintiff's own statement of his claim." We need not repeat our insistence that the present case does make such a "statement of his claim."

We do not overlook the fact, before mentioned, that plaintiff in error also stated diversity of citizenship as a ground of jurisdiction. But we contend that this is not inconsistent with the setting forth and tendering for issue in his petition of the statute upon which he relied, or with the issue joined thereon by the demurrer as to its validity under the federal constitution. In *Muse* v. *Arlington Hotel Co.*, *supra*, at p. 436, allusion is made to the fact that "jurisdiction of the circuit court was invoked on the ground of diverse citizenship and not on the ground that the case arose 'under the constitution or laws of the United States, or treaties made, or which shall be made under their authority.'" Again, in *Colorado Central Mining Co* v. *Turck*, 150 U. S. 138, the same fact appears, the court saying, at p. 144, "that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested *or could be asserted* on any other ground." (Italics ours.) It was further declared

in that case that some question of a federal nature "must appear at the outset, from the declaration or the plea of the party suing, that the suit is of that character" (at p. 143), the court announcing later that jurisdiction "could not be affected by the subsequent developments" (p. 144). But it was also said on the same page: "If the plaintiff had invoked it on two distinct grounds, one of them being independent of the diverse citizenship, a different question might have been presented." We but repeat when we urge that the present case presents the "different question" thus sanctioned.

We may, however, be permitted to say that it is difficult to see why a case brought in the circuit court on the ground of diversity of citizenship may not have another federal question introduced into it by defendant within the purview and meaning of section 5 of the judiciary act of March 3, 1891. Suppose the plaintiff in error had set up and sued on only his bonds, and defendant in error had by answer specially pleaded the statute in dispute alleging that it contravened the fourteenth amendment to the constitution of the United States, what is there in section 5 of the act of March 3, 1891, which ought to prevent the losing party from taking a writ of error from this court direct to the circuit court? What is there in that section which in this regard would differentiate the right of the losing party under section 709 of the Revised Statutes to come here from the state supreme court, if the case had been brought in a state court instead of the federal circuit court under precisely the same pleadings as those supposed in the last preceding hypothesis? The jurisdiction of the circuit court would be complete upon the petition alone; that jurisdiction could not be impaired by the defendants specially setting up another ground. The two sections make no distinction between the rights of plaintiff and those of defendant in this behalf. Indeed the language of the two sections seems in substance

to be the same. "Drawn in question" will be found in both sections. And what is the difference between that phrase and "claimed to be in contravention"? or "in any case that involves?" Why then should not the course pursued in *Water Power Co.* v. *Street Railway Co.*, *supra*, be followed in the case supposed, and also, in the case at bar? At p. 485 of that case it is said:

"The complaint did not set up the contract of the board of directors of the penitentiary with the defendant and the act of the general assembly of December, 1892, confirming the same, but these were both set forth in the answer and relied upon by the defendant as its authority for the erection of its works."

Indeed, it seems to be settled that in all cases coming here, as that one came, from a state court of last resort, this court will look into the answer and into grounds "developed in the course of the proceedings" for a basis of jurisdiction. True, this could not be done as a means of giving a federal inferior court jurisdiction, because that court ca not entertain a case which does not present a ground for jurisdiction primarily. But can it be that the presence of a primary ground of jurisdiction, like diversity of citizenship, will prevent the court from looking into the answer? The important and ultimate question may be presented only by the answer. This is always so, where citizenship is plaintiff's only ground. Should the immaterial ground in point of importance, control the material one?

We know it was said in *Ex parte* Jones, 164 U. S. 691 (and repeated in *Third St. and Suburban Ry.* v. *Lewis*, 173 U. S. 457, and in *Pope* v. *Louisville, New Albany, etc., Ry.*, Id. 573, following *Colorado Central Mining Co.* v. *Turck*, *supra*), that where jurisdiction is originally invoked solely on the ground of citizenship, the judgment of the court of appeals would be final, despite the fact that another ground is developed by the later proceedings. But it is not said there

that if the other ground were actually found to be within any of those specified in section 5 of the act of March 3, 1891, the case could go to the court of appeals, or that the decision would be final if taken there. Such an interpretation of those cases would bring them into direct conflict with *Holder* v. *Aultman*. This is especially so if the presence of a *bona fide* claim that a ground of jurisdiction under section 5 is involved, would not change the course of the cause from the court of appeals to this court; that is, from the course which diverse citizenship alone would require. That, too, would accord to a plaintiff a privilege under the appellate jurisdiction of this court which would be denied to a defendant under precisely similar allegations. We have already shown that the universal practice, so far as the decisions have been made upon the point in the circuit courts of appeals, is that they deny jurisdiction to themselves in such cases, and *Holder* v. *Aultman*, before cited, sustains this practice.

There is one more feature to which we desire to call attention. It is whether we may rightfully ask the court to examine the decision of the court below as an aid to interpreting the record. It was said in *England* v. *Gebhardt*, 112 U. S., at 506, not to speak of other cases, that the rule requiring a copy of the opinion to be annexed to the record does not make it a part of the record. It was laid down in *Kreiger* v. *Shelby Railroad Co.*, 125 U. S., at 44, as "the settled course of decision," that where *statutes* require opinions to be recorded, the court may examine them "to ascertain the ground of the judgment of the state court." And in *Water Power Co.* v. *Street Railway Co.*, *supra*, without stating whether a statute required opinions to be recorded, it was said (172 U. S., at 489), "as it appears from the record and *the opinion* of the court, which may be examined for that purpose, . . . that the question was presented and decided." (Italics ours.) It may be that the court was indif-

ferent about the opinion in that case, because the question appeared in the record as well as the opinion. As it seems to us, the court would naturally refer to the opinion at least as an aid to the interpretation of the record. (See reference made to opinion in *Whitten* v. *Tomlinson*, 160 U. S., at 244–5.) Why should it not? What is the reason for the rule requiring it to be annexed to the record? What is the distinction between a rule and a statute in this respect, since both are alike law to those making and certifying to the records? We respectfully submit that enough appears here to satisfy the court that the writ of error was properly taken direct to the circuit court.

II.

Reply to brief of defendants in error on the merits of the case.

It will not escape observation that the burden of the argument of our learned adversaries upon the merits of the case, is an effort to show that the statute under which the bonds in dispute were issued is in violation of the fourteenth amendment of the Constitution of the United States. They have devoted nearly twenty pages of printed matter to show that this is the ultimate question and that it should be resolved in favor of the defendants in error. It is a striking commentary upon the first ten pages of their brief, which are employed to show that no such question is involved in the record. It scarcely need be said that the constitutional question they argue falls clearly within section 5 of the judiciary act of March 3, 1891. Should the art of fencing be indulged in any longer or should we enter at once into an analysis of the ulterior rights of the parties?

The essence of the argument to show that the bonds are invalid is, that notice of the act under which they were issued is written on their face, and that constructive knowledge of the invalidity of the act and likewise of the bonds, follows as a consequence; and thus it is sought to distinguish the present case from *State* v. *Commissioners*, 37 Ohio St. 526, not to speak of the failure even to allude to *United States* v. *Ft. Scott*, 99 U. S. 152,—decisions upon which we rely in our first brief.

Counsel base their claim of unconstitutionality of the act in dispute upon (1) its mandatory character under the Ohio constitution; (2) alleged analogy between the third section of the act and the statute construed in *Norwood* v. *Baker* under the federal constitution; and (3) denial of severability as between section 3 and the rest of the act.

As shown in our first brief (at p. 17) when these bonds were issued, mandatory legislation of the character now in question was sanctioned by the court of last resort of the State of Ohio.

In *State ex. rel.* v. *Commissioners*, 35 Ohio State, at p. 467, Okey, J., announcing the unanimous opinion of the court, said:

"The power of the legislature to pass a mandatory statute, requiring the commissioners to levy the tax and improve the road in question, is denied by the defendant. The only provision which the constitution contains with respect to the county commissioners is the following: 'The commissioners of counties, the trustees of townships, and similar boards shall have power of local taxation, as may be prescribed by law.' Art. 10, Sec. 7. Manifestly this is no limitation on the power of the general assembly, and the inquiry therefore is as to the extent of such power. That it is only legislative is conceded, but (it) is undeniably a very broad power and includes, generally, the right to direct, *in invitum*, the construction and repair of public highways, and the levy of taxes to defray the necessary expenses thereof."

That decision was made in the year 1880, and it was subsequently approved in *Kumler* v. *Silsbee*, 38 Ohio St., at 447. The rule was never disturbed until 1896, when it was reversed (See cases cited at p. 17 first brief). Meanwhile, to-wit, on September 29, 1894 (R. 2), the bonds now in question were issued. It is not contended and of course could not be, that the validity of these bonds is in any manner affected by the change of judicial decision. (See cases cited at p. 18 former brief).

It follows that when these bonds were issued and the township received the money for them, there was nothing, at least in the Constitution of Ohio as construed by its highest judicial tribunal, to put the purchaser of the bonds upon notice of any want of power in the legislature so to authorize their issue.

But it is claimed in substance that the purchaser of the bonds was chargeable with notice of alleged conflict between the third section of the act and the fourteenth amendment to the Constitution of the United States. True, *Norwood* v. *Baker* had not been decided; but constructively it is said the layman knew that it would be. One difficulty however with these claims of our adversaries is, that they fail to observe what is pointed out in our first brief, to the effect that a rule of judicial decision has always prevailed in Ohio which forbids the levying of special assessments on the part of any public agency in excess of the special benefits conferred; but another difficulty with such claims is that they fail to observe the distinction between a general law, like the one involved in *Norwood* v. *Baker*, and a special law like the one involved here. The statute in *Norwood* v. *Baker* conferred general power upon all villages of the municipal class to which Norwood belongs, through their local councils, to levy assessments of the character there questioned. In enacting that statute, the legislature had no particular street or highway in view, but empowered the village councils to employ the

power in respect to any and all highways which in their judgment should be opened or improved. The vice of such a statute, as we understand the majority decision of this court, was found to be its failure to impose upon the local authorities a duty to observe the rule of benefits in making special assessments. The local authorities were therefore thought to be vested with an arbitrary power contrary to the provisions of the fourteenth amendment.

But in the case at bar the statute is special; it relates to a particular highway, Williams avenue; it describes particular territory which shall be assessed to pay the cost of that improvement; the general assembly itself pursuant to constitutional right and power, as then held by the court of last resort of the state, must therefore be deemed to have considered the subject of special benefits, and to have determined either that the benefits to the prescribed territory would at least be equal to the cost of the improvement, or that if there were any excess of cost it should be included in the obligation of the township itself to pay the bonds which is implied from the direction to issue them to pay for the improvement (R. 1 and 2, and 90 Ohio Local Laws, 251 and 252). In either case the subject of benefits must be conclusively presumed to have received due consideration at the hands of the legislative body which exercised the power. At that very time there was a general law upon the statute books of Ohio which declared that "so far as practicable . . . . regard must be had, in making special assessments, to the probable benefits to the property assessed" (R. S. sec. 2283). True this was a statutory injunction upon creatures of the general assembly; but it cannot be that the creator of such a provision will be presumed itself to ignore the injunction; that would be to presume "that the legislature designed a palpable invasion of the rights of private property, which is not admissible." (*Walsh* v. *Barron, Treas.*, 42 W. L. B. 302 at 306, per Supreme Court of Ohio.)

In *Williams* v. *Eggleston*, 170 U. S. 304, 311, it is said:

"Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited."

Mr. Justice Harlan, in his comment upon this, in *Norwood* v. *Baker* (at p. 279), drew a distinction between a general and an absolute rule respecting assessments without regard to benefits and apparently condemned the absolute rule only when there was no remedy furnished to the property owner to protect himself against its exercise. He said (at p. 279): "and without any right in the property owner to show when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received." In view of what we have already shown respecting the existence of the judicial rule in Ohio forbidding such assessments and giving property owners full remedy against them, the relevancy of *Williams* v. *Eggleston*, to a case like the present one would seem clear.

In *Parson* v. *District of Columbia*, 170 U. S. 45, an act of congress was sustained which determined the area benefited by a public improvement in the District of Columbia to be only the abutting property and fixed the assessment at a uniform rate per front foot on the area so defined.

Spencer v. *Merchant* 125 U. S. 345.

If then a statute would be valid which would authorize municipalities or other local agencies to levy assessments under express injunction to observe the rule of special benefits, it inevitably follows that wherever as in this case the

legislature itself directly exercises the power, it will be conclusively presumed to have investigated into the subject for the very purpose of comparing the probable cost with the probable or apparent special benefits.

The result is that when a purchaser obtained any of the bonds in dispute he was entitled to the benefit of the presumption that the general assembly of Ohio had complied literally with the requirements of the fourteenth amendment. He was also entitled to the benefit of the doctrine that every property holder who should complain that the assessment against him was in excess of the special benefits he received could have such excess enjoined by the proper court of his county and that decision confirmed by the supreme court of his state (R. S. O. 5848). It is therefore difficult to perceive how a person intending to purchase such bonds could be chargeable with knowledge of any invasion of the fourteenth amendment.

The alternative of this contention, as already suggested, is that the purchaser of the bonds was entitled to presume that any possible excess of cost over special benefits would be met and paid under the general township obligation which the statute authorized by its direction to issue the bonds, and which the township incurred by issuing them and receiving the money on them. This was the law of Ohio at the time these bonds were issued. Section 4 of the act in dispute expressly authorized and directed the trustees "to issue the bonds of the township." *State v. Commissioners* (37 Ohio St.), cited in former brief, was a suit to recover upon county bonds. The bonds were to be paid by assessment. The assessment was insufficient. The insufficiency arose out of a failure of property holders to petition for the improvement. This petition was a prerequisite, a condition precedent to the right to make the improvement at all. Say the court, at p. 530:

"As between the county and the taxing district created by the statute, to-wit, 'the territory within two miles of the road improvement,' it cannot be doubted that the intent of the statute was to impose the burden of the improvement upon the latter; but as to the creditor holding bonds issued to meet the expenses of the improvement, the faith of the county to the extent of all its taxable property was pledged, by the express authority given to the commissioners to issue therefor 'the bonds of the county.' Whenever, therefore, payment of the bonds cannot be provided for, by local assessment under the statute, it is the duty of the commissioners to make provision for their payment, as for the payment of other debts of the county, by a levy upon all the taxable property of the county."

The second paragraph of the syllabus of that case, upon which all the judges agreed under their rule, states:

"When from any cause sufficient money be not realized from such local assessments to pay the debt so created, it is the duty of the commissioners to levy a tax therefor upon all the taxable property of the county."

That decision was rendered in 1882 and was approved on the very point now presented, in 1884 (*Holtz* v. *Commissioners of Henry County*, 41 Ohio St., at 434); and the decision has not been disturbed since. The legislature must therefore be presumed to have known at the time it passed the act now in dispute, that if there was a failure or deficiency of assessment from "any cause," it was imposing a township obligation which would have to be met and satisfied out of a general levy. It must also be presumed to have known at the time it passed the act, that if the deficiency arose from an excess of cost over special benefits, the judicial department could be successfully invoked to remedy the matter, and so the property holder was doubly protected against an invasion of his rights in violation of the fourteenth amendment. If then we are to ascribe to a purchaser of these bonds knowledge of all

the questions which could be raised touching their validity, we must not overlook the state of the law as it existed in Ohio at the time.

Although it is not necessary to our argument, we suggest with deference that the court should reconsider the decision in *Norwood* v. *Baker*. We cannot discover that the court's attention was called to the portion of Rev. Stats. of Ohio, section 2283, which imposes duty as to special benefits, before quoted. That provision belongs to the assessment law under consideration in the Norwood case, and naturally should be construed as part of that law. "*Regard must be had* . . . to the probable *benefits* to the property assessed."

As shown in our first brief (p. 19), council had a choice of three modes of levying assessments. One was "in proportion to the benefits." Another was by the front foot." If the ordinance in that case had in terms disclosed an exercise of the first of these powers no question could have arisen; the assessment would have been in express words "in proportion to the benefits." Yet the assessment levied "by the front foot" was made subject to the injunction of section 2283, that "regard *must* be had . . . to the probable *benefits*." If one abutting lot were benefited more or less than another, this would necessarily mean that the rates of assessment should be varied according to the benefits conferred.

Then by sec. 5848 of the Revised Statutes, before referred to, it was further provided:

"Courts of common pleas and superior courts shall have jurisdiction to enjoin illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof. . . ."

We need not again cite the decisions of Ohio which condemn levies made in excess of benefits as "the illegal

levy of . . . assessments," within the meaning of this section. Section 6, article 13, of the Ohio constitution, provides that

"The general assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of . . . assessment . . . so as to prevent the abuse of such power."

Now, are not the statutory provisions so made a reasonable compliance with this injunction of the Ohio constitution? Precisely how can the general assembly comply with that provision, or how can it rationally avoid invasion of the fourteenth amendment, if such provisions are not appropriate and sufficient for doing so?

Besides, common experience shows that benefits ordinarily and naturally accrue to private property by the construction of public improvements such as streets. There is then a general presumption in favor of special benefits. We therefore respectfully urge that there is no foundation for the claim that the Ohio statutes warrant the levy of special assessments without regard to special benefits. he statutes are just the other way. And if a local authority abuse the power, the courts are made a statutory instrument to remedy the abuse. The Ohio courts are quick to restrain such abuses. The federal courts ought not to do less; but ought they to do more? Ought they to strike down the system?

The suggestion of counsel that a re-assessment could not be made, is vain. It is said it could not be done because the re-assessing statute of Ohio applies to municipalities. But the power to assess under the act in dispute cannot be exhausted by an erroneous exercise of the power. As said by the Supreme Court of Ohio, in *Walsh* v. *Barron*, 42 W. L. B. 302, at end last paragraph, second syl.:

"When an assessment is made in substantial excess of

the benefits, it must be set aside and held for naught, subject, however, to the right of the city to have a new assessment made on accurate principles."

The same end would be accomplished by setting aside an inaccurate assessment, if one were made under the present act, and allowing an accurate one to be levied under the original power. This would be only one rightful exercise of the power.

The statement at bottom of page 12 of our adversaries' brief, to the effect that we admit the act to be unconstitutional in one of its features, is a misapprehension. What we said was that the recent decisions of Ohio hold that mandatory assessment statutes are invalid; but we showed that the decisions in force at the time of the issue of our bonds sanctioned such statutes (First Brief, p. 17); also that such a change of judicial decision could not impair the bonds (Id., p. 18). Counsel must then use something other than our admission to make the decisions mentioned at top of page 13 of their brief relevant.

Counsel's attempt to show that the assessment clause of the act is invalid under *Norwood* v. *Baker* is equally futile, for reasons already stated. What then should be said of their discussion of the severability of the act? The citation of cases to show more than the principles underlying severability or non-severability is not very helpful, because each case depends so much upon its own peculiar facts. Analysis of the statute is more to the point. We conceive that counsel have not answered our first brief in this regard. It is no answer to say that the legislative provision for assessing particular lands shows an intention not to place the cost on the township at large. This ignores the authority and direction to issue the bonds *in advance* of the improvement. The bonds are obligations of the township at large. They were and are a township-undertaking of all risks of the assessment. This is the logic of the situation; it is also the *ratio decidendi* of

United States v. *Ft. Scott* (99 U. S. 152), and *State* v. *Commissioners* (37 Ohio St. 526), cited *supra*, and also relied on in our first brief (B. 9, 10.)

The bonds sued on are, therefore, independent promises of the township, upon which their face value in money was received, and is still retained. It was open to the township to refuse to issue the bonds, just the same as it is to refuse to pay them. Can it be that such promises can be repudiated successfully, simply because the township chooses at this late date to question one of the sources from which it may obtain the necessary money? Can it be that such repudiation would be sustained, even if the assessment were for any reason uncollectible?

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No. 276. 42

Br. of Johnson & Bailey

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed April 21, 1900.

LOUIS LOEB,

Plaintiff in Error,

No. 276.] versus

THE TRUSTEES OF COLUMBIA TOWNSHIP, HAMILTON COUNTY, OHIO,

Defendants in Error.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Brief for Defendants in Error.

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(No. 17385).

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Brief for Defendants in Error.

The act of March 3, 1891, (C. 517, Sec. 5; 26 Stat. 827, 828), so far as pertinent to this discussion provides—

"That appeals or writs of error may be taken . . . . from the existing Circuit Courts direct to the Supreme Court in the following cases . . . . in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

The plaintiff, in his complaint, did not claim that any law of the state of Ohio was in contravention of the Constitution of the United States, but simply alleged that he was "a citizen of the state of Indiana, and the defendant a corporation organized under the laws of the state of Ohio

. . . . and a citizen of said state of Ohio," thus showing that the Circuit Court had jurisdiction of the case only by reason of the fact that the parties were citizens of different states.

The action was one at common law, there being claimed in the petition the sum of $2,575, with interest thereon at six (6%) per cent. from September 29, 1896. This petition contained ten causes of action, to each of which a demurrer was interposed, upon the *sole* ground that it did not state facts sufficient to constitute a cause of action against the defendants. The following is the language of the demurrer:

"Now comes the defendant and demurs to the several causes of action in the petition of plaintiff herein, for the reason that the same do not state facts sufficient to constitute a cause of action against this defendant."

This demurrer was sustained, and the plaintiff not asking to plead further, the Court proceeded to render judgment. We give the record entry:

"This cause coming on to be heard upon the demurrer of the defendants herein to the petition, having been argued by counsel, and the court being fully advised in the premises, upon consideration whereof, find that said demurrer is well taken, and sustains the same.

"And thereupon the plaintiff not asking to plead further, the court finds that the plaintiff hath no cause of action nor claim in the premises, and it is ordered by the court that the defendants go hence without day and recover from the plaintiff their costs herein expended; to all of which the plaintiff excepts."

From the above excerpts from the record we can see that the jurisdiction of the Circuit Court, as disclosed in the petition, *was dependent entirely upon the opposite parties to the suit in controversy being citizens of different states*, and that the Circuit Court of Appeals alone would have full authority to review the decision, and that its judgment would be final. (26 Stat., 826, C. 517, Sec. 6).

Nor can it make any difference that another *ground* of jurisdiction not appearing in the petition, sufficient of itself if disclosed therein to authorize a writ of error direct from the Circuit Court to this Court, was developed in the course of the proceedings.

See Ex parte Jones, 164 U. S., 691, 693, where the Court say:

"As the bill was filed after the act of 1888 took effect it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgment of the Circuit Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship."

And this court denied a petition for an order to show cause why a writ of mandamus should not issue to the Circuit Court of Appeals for the First Circuit to allow an appeal to this court from a decree of that court affirming a decree of the Circuit Court for the District of Massachusetts.

In *Borgmeyer, Administrator*, v. *Idler*, 159 U. S., 408, 414, it was said:

"The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this Court from the Circuit Court the writ of error could not have been entertained."

Is therefore the present case one provided for in Section 5 of the Act of March 3, 1891 (26 Stat., 826, 7).

Is it one in which the law of a state is *claimed* to be in contravention of the Constitution of the United States?

Does the record so show?

Opposing counsel admit that there is nothing which, in *express* terms, appears upon the face of the petition, or the

demurrer or the judgment to show that any question was involved entitling plaintiff in error to take a writ of error to this Court. But that the point *appears* in the *decision* of the District Judge sitting in the Circuit Court.

The record of any common law case in Ohio consists of the pleadings and the docket and journal entries, and so it is in the case at bar, we have only the above as properly constituting the record in the printed book. It is true we find therein the opinion of the Judge filed in the case; but this because Rule 8, Sec. 2, of this Court requires it, and we have the direct holding in *England* v. *Gebhart*, 112 U. S., 502, that—

"The opinion in the Court below when transmitted with the record in accordance with Rule 8, Sec. 2, is no part of the record."

This Court saying at page 506:

"Neither is the opinion of the Court a part of the record. Our Rule 8, Sec. 2, requires a copy of any opinion to be annexed to and transmitted with the record, on a writ of error or an appeal to this Court, but that of itself does not make it part of the the record below."

It is equally true that an assignment of errors is made which aims to import this Federal question into the cause which the *record* does not show was raised in the Court below, and ruling is asked thereon so as to give this Court jurisdiction. That this can not be done was held in *Ausbro* v. *United States*, 159 U. S., 695, 698.

The opinion of Judge Thompson (attached to, but not forming part of the record) is certainly a luminous exposition of the law; but are the rights of either party to a writ of error to be concluded by that opinion? If, as must be admitted, the demurrer attacks the petition on any ground which may be argued under the reasons assigned, to-wit, "that the petition does not state facts sufficient to constitute a cause of action," may not the petition on its face disclose an unanswerable argument why it is fatally defective, and

for a reason not assigned in the opinion given? In other words, the Judge may decide the case on a point not really tenable, ignoring a good point, or may come to a correct conclusion, assigning the wrong reasons.

Take the case at bar, the petition on its face discloses that plaintiff's several causes of action are to recover the contents of choses in action. The Act of March 3, 1887, (Sec. 1, 24 U. S., at Large, Ch. 375, p. 552), provides:

"No Circuit Court of the United States has cognizance of any suit except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such Court to recover the said contents if no assignment or transfer had been made."

There is no averment in this petition that Louis Loeb or plaintiff is the original holder, and not an assignee or subsequent holder of the instruments sued on, and if said plaintiff holds such instruments as assignee or subsequent holder, and the petition discloses that the same were not made by a corporation, then averments should have been made in the pleading showing the diverse citizenship of the original holder and the defendant.

It is true it is averred in the petition that the Trustees of Columbia Township of Hamilton County, Ohio, *is* a corporation organized under the laws of the state of Ohio, etc., but this averment is a mere conclusion of law, and the Court below was bound to take judicial notice of the laws of the state of Ohio, particularly of such of those laws as related to the organization of a municipal and local subdivision of the state.

It is familiar law that a township is a mere subdivision of the state for political purposes, and is not in any sense a corporation.

In *The State* v. *Powers*, 38 O. S., 54, at 62, the Supreme Court of Ohio say:

"On the other hand, school districts are constituted so as to partake rather of the character of counties and townships, which are provided for in the 10th Article of the Constitution, not as corporations, but as mere subdivisions of the state for political purposes, as mere agencies of the state in the administration of public laws. *Hunter* v. *Mercer County*, 10 Ohio St., 515; *State* v. *Cincinnati*, 20 Ohio St., 18,)and at bot. p. 37). In this article reference is made to 'similar boards' in connection with the commissioners of counties and trustees of townships.

"It is quite obvious, therefore, that county and township organizations, although *quasi* corporations, are not within the meaning of this provision of the Constitution."

Judge Taft, in *Brattleboro Sav. Bk.* v. *Board of Trustees of Hardy Tp., Holmes Co., Ohio*, 98 Fed. Rep., 524, held as follows:

"A township in Ohio is not a corporation, within the meaning of the state Constitution; and Article 13, Section 1, of such Constitution, providing that the Legislature shall pass no special act conferring corporate powers, does not render invalid an act authorizing a township to issue bonds."

And further in the course of his opinion said, in effect, that the power to issue bonds and borrow money, when conferred upon township trustees, was not a corporate power, using the following language. (*Ibid*, pp. 528–9).

"The opinion of Judge Scribner in delivering the opinion of the Circuit Court of Huron County in the case of *Eckstein* v. *Board*, 10 Ohio Cir. Ct. R., 480, 490, expressing the view that an act conferring upon the authorities of the Chicago Junction village school district power to borrow money and issue bonds is a special act conferring corporate power, within the Ohio Constitution, can not, in view of the cases already cited, be regarded as an authoritative exposition of this constitutional limitation. It seems to be held by the Court, through the learned Judge, that the power to issue bonds and borrow money is a corporate power, upon whomsoever it may be conferred, and therefore that, if conferred upon a school district, it is within the constitutional restriction. In this view I can not concur. There is no

reason why a natural person may not issue bonds and secure them by mortgage. The power thus exercised is not corporate, therefore, except when it is conferred upon a corporation; and it is not corporate, within the Ohio Constitution, except when it is conferred upon a corporation such as that instrument contemplated in the inhibition."

If the above be good law then the objection here urged might be raised by demurrer.

Holmes v. *Goldsmith Co.*, 147 U. S., 150.

And the demurrer in the case at bar was properly sustained, for the reasons just discussed, and not because of any claim in the record that the law under which the bonds were issued was in contravention of the Constitution of the United States. In other words, it never became legally necessary for defendants below to make such a claim or that the Court should pass upon it, if they did.

Nor does such a claim come into the case, because the Court assigns wrong reasons for its correct conclusion in sustaining the demurrer, and rendering judgment for the defendants.

The record entries of the Court's action in this respect are all important. Its reasons assigned in any opinion, unimportant.

If we be correct in the foregoing conclusions, then no writ of error could be taken direct to the Supreme Court from the judgment of the Circuit Court, for there was no case presented by the record or decided by the Court in which a law of the state of Ohio was held or claimed to be in contravention of the Constitution of the United States.

But there is another way of coming to the same conclusion. Suppose the Court had rendered no opinion, and the record was in all respects as it is now; or suppose that without an opinion the Court had overruled the demurrer and the defendants not desiring to plead further, the Court had rendered judgment in favor of the plaintiff. Could it

be said in either case that a Federal question was raised or claimed upon the record? Must there not be some distinct asseveration of this claim, by apt words, either in the pleadings, or carried into the judgment of the Court, as entered upon the record? Must not the plaintiff state in his petition, if he intends to give the Court jurisdiction on this ground, that the law of the state contravenes the United States Constitution, and the defendant likewise if he hopes to demur or plead to the action successfully, must he not, too, as ground for his demurrer or in order to set up a sufficient answer state in his pleading that the law of the state which he resists is in contravention of the United States Constitution? If this is not required of him, if the judgment of the Court speaks not by the record, or, in other words, if the reason for that judgment does not appear in the record, then the whole matter is left to conjecture, and no Court can tell whether a Federal question is really passed upon or not.

There is a grave question of doubt in this case, and presented on the record here, whether a writ of error could be sued out from any Court to reverse the judgment of the Circuit Court. There was, in legal effect, a trial by the Court, because plaintiff did not desire to plead farther after demurrer; there was no written stipulation waiving a jury, and without such stipulation, if the Court tries the cause and renders judgment, there is no right of review in the Supreme Court on any question of law arising in the case.

Kearney v. *Case*, 12 Wall., 275.
Desty's Federal Procedure, 9th Ed., Sec. 116.

While we admit that the jurisdiction of this Court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the Court below, that is, whether the Court found for or against such a claim, yet we do insist that the Federal question must appear in the record (either

in the pleadings or in the judgment entry), or such decision must have been so necessarily involved in the case that the case could not have been determined, without deciding such question.

In the latest decision upon this question, *Telluried Power Transmission Co.* v. *Rio Grande Western Railway Co.*, 20 Sup. Ct. Rep, 245, at p. 248 the Court say:

"If it sufficiently appear from the record that the validity of a state statute was drawn in question as repugnant to the Constitution of the United States, and the question was decided or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms set up and claimed in the record is not conclusive against a review of the question here."

As we have already shown herein, it does not in the present case sufficiently appear from the record that the validity of a state statute was drawn in question, or that the question was decided or that such decision was necessarily involved in the case, or that the case could not have been determined without deciding such question; on the contrary, the case could have been and should have been determined without deciding such question by sustaining the demurrer on the grounds as heretofore set forth herein.

Neither the argument of counsel nor the opinion of the Court below can be looked to for the purpose of deciding whether this Court has jurisdiction.

Gibson v. *Chouteau*, 8 Wall., 314.

Nor will jurisdiction be entertained by this Court if the judgment below may have been given on grounds on which error could not have been directly prosecuted to this Court.

Steines v. *Franklin Co.*, 14 Wall., 15.

We believe that under Sec. 5 of the Act of March 3d, 1891 (26 Stat., 827, 828), the Federal question in the case

should be, with possibly some rare exceptions, specially set up or claimed to give this Court jurisdiction.

Water Power Co. v. *Street Ry. Co* , 172 U. S., 475, 488.
Spies v. *Illinois*, 123 U. S., 131, 181.
Oxley Stave Co. v. *Butler Co.*, 166 U. S., 648.

In short, we insist that when in any case the Constitution or law of a state is claimed to be in contravention to the Constitution or law of the United States, such Federal question must be raised and presented by the record precisely as like questions are presented under Sec. 709, Rev. Stat. U. S.—that is, the Federal question must be specially set up or claimed at the proper time and in the proper way.

Columbia Water Power Co. v. *Street Ry. Co.*, 172 U. S. 475, 488, and cases there cited.
Desty's Federal Procedure, 9th Ed., Sec. 223, p. 770.

And the rights to set up must have been denied, either expressly or by necessary implication.

Water Power Co. v. *Street Ry. Co.*, 172 U. S., 475, 488, and cases there cited.
Desty's Federal Procedure, 9th Ed., Sec. 223, p. 770.
Scudder v. *Comp. of New York*, 175 U. S., 32, 36.
Allen v. *Southern Pac. R. R. Co.*, 173 U. S., 479, 488.

It is always in order to raise the question of jurisdiction, and the Court, when the same is presented in whatever form, must always consider it. We ask the Court on the record here presented to dismiss the within proceeding for want of jurisdiction, because there is not disclosed thereby any Federal question as presented, or if it were presented, because the Court's decision may be properly rested upon grounds wholly independent thereof, and which grounds are entirely adequate to sustain the judgment rendered by the Court without considering any Federal question at all.

The entire argument on the question of this Court's jurisdiction is of course to no effect if the Court should grant the plaintiff's application now pending herein for a writ of *certiorari* to the Circuit Court of Appeals of the Sixth Circuit, in a cause bearing the same title therein, but as we can not in any manner anticipate the Court's determination thereon, we submit our views on the question of jurisdiction to be considered by the Court should the ruling on the application for *certiorari* leave the same still open.

II.

Inasmuch as it is claimed that this case was decided by the Court below, on the ground that Section 3 of the act in question, known as the Williams Avenue Act (90 Ohio Local Laws, 251–2), was in violation of the 14th Amendment of the Constitution of the United States, it should be stated that this Section 3 provided that "the trustees shall receive reasonable compensation for their services, which—*with all costs and expenses of constructing said improvement*, together with the interest on any bonds issued by the trustees for the same, shall be *levied and assessed upon each front foot* of the lots and lands on each side of said Williams avenue and between the termini mentioned in Section 1 hereof."

It is also to be noted that the act in question is mandatory, allowing no discretion to the Township Trustees as to the making of the proposed improvement, nor as to the assessment of the cost and expenses provided for by Section 3.

It is also to be borne in mind that each of the bonds sued on specifically refers to the act under which it was issued, as the authority for its existence, so that no question of estoppel by recitals can arise.

We most strongly controvert the statement of plaintiff in error that "to uphold the act with the special assessment

eliminated will do justice—and to invalidate it on the other hand will work injustice." The Legislature attempted to impose an imperative duty upon the township officers without any benefit to the township, the fact that the total cost was to be assessed *upon the abutting property* shows a determination by the Legislature that the act would not benefit the township as a whole. For the purpose of financing the project, an attempt was made under the act to impose upon the township a liability to be fully repaid by the abutting property owners. The township was virtually compelled to lend its credit to those for whose benefit the statute was supposed to be passed, though without opportunity on its part to make any showing as to the benefits. Under the general laws of the state, the township would not have had to pay any part of the expenses unless the Trustees found the proposed improvement would be beneficial to the township, and of their own volition imposed a part or the whole of the cost upon the township.

Section 4677, R. S. O.

The method of recoupment provided for in this statute being unconstitutional, the township, if plaintiff in error's contention be correct, will be compelled to pay the entire cost of an improvement not designed or intended by the Legislature for the benefit of the township as such; and as already stated, these bonds carry notice of their invalidity on their face.

Plaintiff in error's statement that a contractual obligation arises out of the authority to issue the bonds is irrelevant to this case and an evasion of the true issue, which is, "whether there was any authority to issue the bonds." The authority to issue the bonds is found only in the special act in question. That act (as counsel for plaintiff in error admit for the purpose of this argument) is unconstitutional as to one of its features.

"An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no offense; it is in legal contemplation as inoperative as though it had never been passed."

Field, J., in *Norton* v. *Shelby Co.*, 118 U. S., 442.

"Bonds issued by a municipal corporation, but not under either general authority to borrow for corporate purposes or special legislative authority to borrow for purposes *within the power of the Legislature to confer*, are void in the hands of a person who is not an innocent *bona fide* holder without notice."

Ottowa v. *Carey*, 108 U. S., 110.

The defect here not being in the proceedings of the trustees as in the cases cited by plaintiff in error, but arising from a lack of power of the Legislature to authorize what was attempted to be done, cases cited as to contractual obligations issued by officials, under constitutional laws, where the assessments failed because of irregularity in the proceedings, are not pertinent to this discussion.

It appears by the third paragraph of the syllabus in *State* v. *Commissioners*, 37 O. S., 526, that the decision is placed upon the ground "that the purchaser of bonds who has no actual knowledge of defects in their execution is not bound to look beyond the finding and record of the commissioners for the purpose of ascertaining whether conditions precedent to their execution have been performed."

The situation is radically different where the act on which all the proceedings rest is invalid for constitutional reasons.

Plaintiff in error, however, claims that, omitting Section 3, enough remains of the act in question to authorize and require the Trustees to issue the bonds and thereby bind the township. There is no doubt in some cases part of a statute may be eliminated, because unconstitutional, and the remaining sections stand; but the question which arises in such a case is not whether the Legislature *could*

have enacted such a statute, but whether it *would* have done so had it foreseen that such parts of the statute would be declared unconstitutional.

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional though another be declared inoperative and void because unconstitutional, but these are cases where the parts are so distinctly separable that each can stand alone, and when the Court is able to see and declare that the intention of the Legislature was that the part pronounced valid should be enforceable even though the other part should be void. To hold otherwise would be to substitute for the law intended by the Legislature one which they may never have been willing to enact by itself."

Matthews, J., in *Poindexter* v. *Greenhow*, 114 U. S., 304, cited and approved in *Pollock* v. *the Farmers' Loan & Trust Company*, 115 U. S., 601, 635.

"Where one part of the statute is unconstitutional, that fact does not authorize the Courts to declare the remainder void also, unless all the provision are: First, connected in subject matter; second, depending upon each other; third, operating together for the same purpose, or, fourth, otherwise so connected together in meaning that it must be presumed that the Legislature would not have passed the one without the other."

Cooley's Constitutional Limitations, 211.
Commonwealth v. *Hitchings*, 5 Gray, 480.
Warren v. *Charlestown*, 2 Gray, 84.

As is well pointed out by Judge Thompson, in *Loeb* v. *Trustees Columbia Tp.*, 91 Federal Rep., 37, the sections in question are connected in subject matter—such provisions having generally been associated together in both general and special laws on the subject of local improvements. We therefore claim that they were intended to operate together for this purpose *here*, viz., to construct Williams avenue at the sole expense of the abutting property owners, and such being the purpose it is beyond reason to suppose the Legislature would have passed the act omitting

the third section, whereby the cost would have been thrown wholly, and at once, upon the township.

In this connection we wish also to cite:

Martin v. *Tyler*, 4 North Dakota, 278,

where the Court say, in effect, the fact that the Legislature has directed the cost to be assessed upon the property supposed to be benefited by the improvement, *is a determination that the county or other political subdivision is not benefited thereby.* "This determination is final. In this case, by placing the benefits and burdens elsewhere, the Legislature has declared that the county, *quoad hoc*, is not benefited. The whole burden is thrown upon other corporations and persons. The obligation rests entirely upon them and they are never relieved. All the county can do, is to obtain for them an extension of time of payment by the loan of its credit."

It is sufficient to say that the purpose of this act was to provide a highway, should not this be qualified by the clause—"the expense thereof to be paid by the abutting property owners?" Otherwise, why enact a special law? There were general laws under which the road could have been established, if the township trustees considered it of sufficient public importance so to do. (See Section 4677 Revised Statutes of Ohio). The provisions of the act in question placing the burden of the work to be done on the trustees and authorizing the raising of money, impose such duties upon them solely as a matter of convenience. If there had been a direct mode of compelling the owners to improve the highway, the township would not have appeared in the matter; but it was deemed convenient to make use of existing officials in order to raise money to pay abutting property owners for land taken, and so to do before assessing back upon them the cost and expense of the improvement. The purpose of the Legislature to fix

this cost eventually upon the abutting property owners was clear. The assessment of such cost and expense upon the abutting property owners is always one of the most important features of such legislation, and it would be difficult to say that the Legislature would have been willing to enact a law without such provisions as to this burden. Can it, therefore, be said that the Legislature would have enacted a law whereby the total cost of such improvement would have been placed upon the township in the first instance?

"It must be obvious in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder, that are allowable in support of the complete act, where some cause of invalidity is suggested to the whole of it. In the latter case we know the Legislature designed the whole act to have effect and we should sustain it if possible; in the former we do not know that the Legislature would have been willing that a part of the act should be sustained if the remainder were held void and *there is generally a presumption to the contrary*. While, therefore, in one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest that the portion not opposed to the Constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part that was void."

Angell's Note to Cooley's Constitutional Limitations, p. 212.

As to this feature we submit that the imposition of the cost upon the abutting property owners was an essential and integral part of the purpose of the act in question, and that without this feature the act would not have been passed. Whether the sale of the bonds preceded or followed the levy of assessment is immaterial.

Passing for the present the question whether or not the clearly defined intention of the Legislature, to fix the cost of the improvement of the abutting property is an integral part of the purpose of the act, we find on page seven (7) of the

brief of counsel for plaintiff in error the following admission, which we believe is fatal to the contention that the act can be severed, "the object of the assessment was to provide a fund to *reimburse* the township for expenditures or to liquidate a liability which had been incurred." In other words, it is admitted by opposing counsel that this third section of the act was at least intended as a compensation or consideration for the liability sought to be imposed upon the township. This view of the case we respectfully urge is fatal to the claim that the balance of the act can be sustained regardless of this provision for "a whole act must be declared invalid when it is apparent from an inspection of it that certain invalid portions formed the inducement or consideration for its passage."

Trumble v. *Trumble*, 37 Nebraska, 340.
Low v. *Rees Printing Company*, 41 Nebraska, 217.

"Where the void portions of a statute were evidently intended as compensation for or inducements to the valid portions thereof so that the whole taken together warrant the belief that the Legislature would not have passed the valid portions alone, the whole should be held invalid."

Walsh v. *Dousman*, 28 Wis., 541.

And if the different parts of a statute "are so materially connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant the belief that if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

Shaw, C. J., in *Warren* v. *Charleston*, 2 Gray, 84, cited and approved in *Pollock* v. *Farmers' Loan & Trust Company*, 158 U. S., 601, 635.

In *Slauson* v. *Racine*, 13 Wis., 398, the first section of the act in question provided that certain tracts and land be annexed to the city of Racine. The second defined the

boundaries and provided that the farming and agricultural lands should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of six per cent. This exemption being unconstitutional, it was held that the entire act fell. The Court says (page 451):

"The provision was clearly intended as a compensation for the annexation, and stronger language could not well be selected to show that the Legislature intended the one to be subject to the conditions stated in the other, and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso."

In *Tate* v. *Parkland*, 11 Ky. Law Reporter, 838, it was held that where a statute enlarged the limits of a town and provided for the appointment of trustees with power to improve and grade streets, issue bonds and levy and collect a tax on all property in the town, liable for state taxes; and this tax was unconstitutional as to agricultural lands so annexed to said town, then the entire act failed, the Court saying "to enforce the collection of taxes (*i. e.*, against non-agricultural property) would impose a burden on those residing within the limits of Parkland greatly more than and different from what it was intended by the act they should bear. For, as said, the intention was to impose the burden upon all and as much of the property has been released, the entire act in reference to the issue of the bonds must fail."

And where, under the same law, a tax was levied to pay the bonds issued thereunder, the levy of the tax was enjoined on the ground that the exemption by the Constitution of the farming lands from taxation rendered the whole act invalid, as "it could not be presumed that it was the legislative intent that the actual town should bear the whole burden."

"The Legislature never intended that the measure of the liability upon the taxpayers should be determined by the extent to which the act should be held constitutional."

Parkland v. *Gaines*, 11 Ky. Law Reporter, 64.

The Supreme Court of Ohio, in *Root* v. *Board of Education*, 52 O. S., 589, has adopted this rule. In that case the statute in question provided in its first section that all *bona fide* residents in a county containing a city of the first grade, first class, should be admitted to the high schools of such city on the same terms as its residents. The second section provided for the levy of a tax to pay the expense of such high school. In an action in mandamus to compel the admission of a non-resident pupil to the city high school, it was held that the second section of the act was unconstitutional, the tax not being uniform, and therefore the entire act fell. The Court say (all concurring) :

"This is not a case in which the invalid portion of the law may be rejected without affecting the entire statute. The provisions of the first and second sections are dependent. We can not assume that the Legislature would have authorized the children of non-residents to attend the high school of that particular city without the provision as to taxation contained in the section. The invalidity of this section renders the entire act invalid." (Page 599).

See, also :

State v. *Perry*, 5 O. S., 497.

It is not irrelevant to consider other legislation on the same subject matter, and we submit that there is no better test for determining whether the Legislature would have passed an act omitting the assessment feature, than its policy for the past twenty years.

Under the general law the Trustees were not compelled to pay for any road unless they deemed it of sufficient importance to the public ; the fact that the Legislature directed the cost to be assessed upon the abutting property owners is a determination that the township was not benefited.

Martin v. *Tyler*, *supra*.

The Legislature sought to impose a liability on the Trustees and attempted to make compensation for such lia-

bility. There is therefore no room for a presumption that the act would have been passed if the Legislature had known or contemplated that this provision for compensation would fail because unconstitutional.

In *Skagit County* v. *Stites*, 10 Washington, 388, the act in question provided for: 1st, the securing of the right of way for the construction of public improvement, viz., drainage ditches; 2d, the construction of the ditches; and, 3d, the apportionment of benefits and assesssment of cost on property benefited.

The first section, *i. e.*, which provided for securing the right of way, was held unconstitutional, and therefore in an action by the county against a property owner to enforce the assessment provided for in the third section, it was held that the entire act failed and the loss was thrown upon the contractor for the work.

The Court say:

"The fact that there is a *possibility* of constructing a ditch under the remaining portions of this act is not sufficient to except it from the presumption that the Legislature would not have passed the parts of the act in question as independent provisions without conferring upon the county the right to condemn the lands for the right of way, and that part being unconstitutional, the whole act must fall."

A Minnesota statute cut off the mortgagee's remedy of foreclosure and at the same time abolished the right of a judgment creditor to redeem property upon foreclosure by a prior lien-holder. The first section was held unconstitutional as to mortgages previously executed, and it was therefore held that the clause abolishing the right to redeem fell also.

"Where an act of the Legislature is void for unconstitutionality, and some of its provisions standing alone would be unobjectionable, the latter will fall with the former if the provisions are so mutually dependent or connected with each other either as conditions, considerations or compensations for each other as to warrant the belief that the Leg-

islature intended them as a whole and would not have passed any if all could not stand."

O'Brien v. *Kruez*, 36 Minnesota, 136.

"A scheme for adding territory to a city embodied in several statutes passed cotemporaneously, providing among other things for sewers and water works, and which would not have been passed had not a provision been inserted exempting the added territory from taxation of a certain kind for a certain period, must go down if the provision for exemption is found to be unconstitutional.

"Where a single statute or several statutes constituting one scheme contain one or more unconstitutional proceedings, the obnoxious provisions will be eliminated and the statute or scheme sustained, unless the provisions are deemed so essential and are so interwoven with the others that it can not be reasonably presumed that the Legislature intended the statute to operate otherwise than as a whole, and in that event the entire statute or scheme fails."

Jones v. *Memphis*, 101 Tennessee, 188.

In the above case the issue of bonds under the act was enjoined.

Where a statute provided for the erection of levees, and the assessment of taxes to pay the expense, and it was held that the levy of a tax on land alone, omitting personalty in a certain levee district and excepting land under water, violated the constitutional requirement that all property, real, personal and mixed, should be taxed, the whole act was held void.

Reelfoot Lake Levee District v. *Dawson*, 97 Tennessee, 151.

And in *State* v. *Godwin*, 123 N. C., 697, it was said that the whole act appeared on its face to be one common scheme for working the public roads of Hertford county, and that the enforcement of its provisions depended wholly upon the tax provided for in the first section, which tax was unconstitutional because it disregarded the equation of taxation between property and poll taxes, and therefore, the entire act fell.

In case of *Martin* v. *Tyler*, 4 N. Dakota, 278, the construction of a drain, enforcements of the assessment, the payment of a drainage warrant issued for lands taken, and the issue of bonds were all enjoined. The Court say, "under Section 14, Article I of the Constitution of North Dakota," which reads: "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into Court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation be first made in money or ascertained and paid into Court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury unless a jury be waived," private property can not be taken for public use without just compensation in money being first made to or paid into Court for the owner, even though it is sought to be taken by municipal corporation.

Since the act failed to provide compensation as required by the Constitution, the power of eminent domain could not be exercised under the statute and shorn of the provisions relating to the right of eminent domain, the statute become so incomplete and ineffectual that we can not presume that the Legislature would have passed it thus.

As to the statement of opposing counsel that the presumption of validity attaches to every part of the statute, we respectfully refer to Angell's note to Cooley Constitutional Limitations, *supra*.

We insist that the intention of the Legislature was not only to cause the improvement to be made, *but to cause it to be made at the expense of the owners of property abutting on the improvement*, and that the liability attempted to be imposed upon the township was but a means to this end; further, even adopting the argument of opposing counsel that the assessment provision was intended merely to reim-

burse the township, still this compensatory provision having failed because of lack of power in the Legislature to enact it, *it can not be presumed that the Legislature would have imposed or attempted to impose this liability without providing such compensation.*

III.

Section 3 of the act in question prescribed the same arbitrary mode of assessment as that held to be unconstitutional in *Norwood* v *Baker*. It provides exclusively for an assessment without regard to benefits.

There is no distinction in meaning, as claimed by opposing counsel, between the words "upon *each* front foot" and "by the front foot." It is not competent for a Court to sustain an assessment made upon an arbitrary and unconstitutional basis even to the extent of actual benefits conferred.

This section three (3) being an essential part of the law, any one affected by its unconstitutionality can raise the objection—the assessment is void in toto and not merely so far as it may be shown to exceed the benefits—there can be no re-assessment under this act.

In the present case the Legislature, in a special local act, without knowledge as to the benefits to be derived, declares that the total cost of improvement, including the compensation to the trustees, shall be assessed "upon each front foot" of the abutting property.

Does this language leave any room for a presumption that the Legislature had in view or considered any benefits to be derived by these property owners. Was it not purely the exercise of an arbitrary power, irrespective of such benefits?

To be sure counsel attempt to draw a distinction between the term "upon each front foot" used in this act and the words "by the front foot" used in Section 2264, Revised

Statutes of Ohio, and by way of anticipation say that only by a play upon words can the two be made to appear identical. But we fail to see wherein a valid distinction can be drawn between them.

This difference in terminology, though not in meaning, may arise from the fact that the act in question is a local law corresponding rather to an assessing ordinance for a local municipal improvement made under general laws, and where the language invariably used in Ohio, so far as relates to the mode of assessment, is: "There (shall) be levied and assessed upon each front foot of the lots and lands abutting, etc." (See Coppock's New Municipal Code, page 343, as follows:

"Section 1. That to pay the costs and expenses of improving ——— street from ——— to ——— in accordance with the provisions of Ordinance No. ——, etc., there be levied and assessed *upon each front foot of the lots and lands abutting* upon the said street between the points aforesaid."

When an assessment is according to value the ordinance reads invariably as follows (Coppock's New Municipal Code, p. 343): "That there be levied and assessed *upon each dollar of the value thereof* as assessed for taxation."

And when the assessment is according to benefits the ordinance reads (Coppock's New Municipal Code, 364, note to Sec. 2281): "That there be levied and assessed upon the lots and lands described in said report several amounts as therein set forth. 'Name of owner. Number of lot or other description. Size of lot. Amount assessed.'"

So we see that the words "upon each front foot" are used, not to designate the property to be assessed, but the mode of assessment.

In *Ernst* v. *Kunkle*, 5 O. S., 520, p. 522, the statement of the case is, that the Council assessed three and fifty-eight one-hundredths ($3.58) dollars "on each front foot of the

land abutting," and this is termed in the syllabus and opinion of the Court an assessment "by the front foot."

The assessing ordinance which was construed in *Norwood* v. *Baker* assessed the amounts on "each front foot of the several lots of land bounding and abutting on Ivanhoe avenue" (172 U. S., 269, 276), and the decision of the Court was based on that ordinance. We can not find that the expression "on" or "*upon each front foot*" has been used in any instance simply to designate the lots and lands or territory to be assessed. On the contrary, it is the appropriate language to designate an assessment *by* the front foot, and we have therefore in the instant case an act providing but one mode of assessment and that one without the slightest reference to benefits, and, as Judge Thompson well says (91 Fed. Rep., 37), "all that is said in the Baker case is equally applicable to the case at bar."

In the case of *Schroeder* v. *Overman*, cited by counsel for plaintiff in error, 42 Cincinnati Weekly Law Bulletin, 296, the plaintiff contesting the assessment raised an unnecessary issue, *i. e.*, "whether or not the assessment on her particular property was in excess of the benefits," and on this issue the Circuit Court found against her in a separate finding of fact, and therefore the Supreme Court of Ohio on that ground refused to enjoin the assessment, bowing, as they say, nevertheless, to the decision of this Court (Supreme Court of the United States) in *Norwood* v. *Baker*. If our contention be correct, that there is but one mode of assessment provided for in the act in question, then the dictum in *Walsh* v. *Baron*, 42 Cincinnati Weekly Law Bulletin, 302, cited in plaintiff's brief, to the effect that a second assessment might be here made, does not apply, for the reason that Section 2290, Revised Statutes of Ohio, provides for re-assessment *only by the council of a municipal corporation*, and does not apply to an assessment made by township trustees under a special act, as in the present

case. The Williams avenue act provides for one mode of assessment only. An assessment according to benefits could only be authorized, if at all, by a new law, the constitutionality of which it is not necessary to consider here. This Court, as we understand its decision in *Norwood* v. *Baker*, frequently cited herein, held that an assessment made by the front foot, and without regard to benefits, could not be sustained, though there had not been tendered to the Village of Norwood an amount equal to such benefits; that the village having attempted an arbitrary invasion of constitutional rights, the proceedings were not even valid in part, but that the assessment as a whole should be enjoined. Hence if the dictum in *Walsh* v. *Baron, supra*, is construed to mean that an arbitrary assessment can be made by the front foot without regard to benefits, but thereafter may notwithstanding be sustained to the extent of the special benefits conferred thereby, then the decision of the Supreme Court of Ohio is in conflict with the decision of this Court in *Norwood* v. *Baker*.

Section 2283, Revised Statutes of Ohio, providing that, "so far as practicable under the provisions of *this title*, regard must be had in making special assessments to the probable benefits to the property assessed," does not and can not control the subsequent special and local act here in question not forming a part of "that title," if indeed the section is of any force with its proviso "so far as practicable." The Williams avenue act does not refer to, nor is it governed by the general statutory provisions relating to local assessments, although it is controlled by direct reference contained therein (90 Ohio Local Laws, p. 251, Sec. 2) to general statutes relating to condemnation proceedings.

If the Supreme Court of Ohio would, as our opponents say (in their Brief, page 22) "limit the amount of any assessment to the benefits conferred and so sustain and

not invalidate the act," then this Court following its own decision in *Norwood* v. *Baker* would reverse such a holding and hold as before, that the scheme of assessment having no reference to benefits, was void *in toto*, and not only so far as it could be shown in each particular instance to exceed the benefits.

The statement of counsel (Brief, page 23) referring to the case of *Norwood* v. *Baker* that "the statute under which the assessment was levied was not declared invalid, but merely the assessment," is, we think, misleading.

> "The assessment was in itself an illegal one because it rested *upon a basis* (*i. e.*, the statute) which excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only proper one."
>
> *Norwood* v. *Baker*, 172 U. S., 269, 291.

Any new assessment would necessarily rest upon some other basis than by the front foot. Such a reassessment in the present case is impossible, for, as we have already shown the provisions of the Ohio Statutes for reassessment (Rev. Stats., Ohio, 2290) relate only to assessments by municipal corporations under general laws.

The claim that an assessment, made without regard to benefits, can be sustained by showing that the benefits actually exceed the amount of the assessment, or can be limited to an amount not exceeding the benefits, was fully discussed in *Norwood* v. *Baker*, 172 U. S., 269, 290, and was rejected by this Court in the following language:

> "It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show, nor offer to show by proof, that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if proof had shown an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost ex-

ceeded the benefits. We do not concur in this view, as the pleadings show the Village proceeded upon the theory justified by the words of the statute that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property irrespective of special benefits. The assessment was by the front feet and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the Village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

The Court also say (page 293) :

"The present case is not one in which, as in most cases brought to enjoin the collection of taxes or the enforcement of special assessments, it can be plainly or clearly seen from the showing made by the pleadings that a part of the amount, if not more, is due from the plaintiff, and which amount should be paid or tendered before equity would interfere. It is rather a case in which the entire assessment is illegal. In such a case it was not necessary to tender, as a condition of relief being granted to the plaintiff, any sum as representing what she supposed, or might guess, or was willing to concede was the excess of cost over any benefits accruing to the property. She was entitled, without making such a tender, to ask a court of equity to enjoin the enforcement of a rule of assessment that infringed upon her constitutional rights. In our judgment the Circuit Court properly enjoined the enforcement of the assessment as it was, without going into proofs as to the excess of the cost of opening the street over special benefits."

Since the decision in the above case it has been followed with copious quotations in at least one State Supreme Court, viz., that of Texas in the case of *Hutcheson* v. *Storrie*, 92 Tex., 685.

In that case it appeared there was a provision in the city charter under which the assessment was made, that if for

any reason recovery upon the certificate (issued to the contractor in payment for the improvement) could not be had in accordance with the assessment on the front foot rule, a recovery might still be allowed according to the standard of benefits to the lot; but it was held that that provision did not authorize or require the defendant to enter into the question of benefits in order to defend against recovery upon the invalid assessment under the front foot rule. (Pages 697 and 698).

It is plain from the remarks of that Court on pages 693 and 697 that it does not place upon the case of *Norwood* v. *Baker* the interpretation contended for in plaintiff in error's Brief (page 23), where it is said "that the statute (the Norwood case, under which the assessment was levied) was not declared invalid," for, after stating the claim of the contractor that the property owner might have had the question of benefits investigated in that suit and the assessment reduced so as not to exceed the special benefits received, the Court say (697) that "substantially the same question was presented in the case of *Norwood* v. *Baker*, where it was contended that the party who sued to enjoin in that case should have shown that the assessment was in excess of the benefits received and that the Court should have rendered judgment for the amount the property was benefited by the improvement." The Court then quote (page 698) the language of this Court in that case as heretofore cited herein (172 U. S., 290) and say (page 698): "The quotation entirely refutes the contention made in this case and needs no argument to dispute it."

If the township, under the general laws, had voluntarily made this improvement and issued bonds to pay for it, then it should not be permitted to escape liability because of the failure of the mode of recoupment *it* had selected. But these trustees were directed by a mandatory act to assume the burden of the improvement and the liability for the cost

of the same, although in the eyes of the Legislature the improvement was not for the benefit of the township. If the fixing of the cost upon the abutting property was an integral part of the purpose of the act, then the township ought not be held responsible for the failure of the Legislature to exact a constitutional law. If, on the other hand, as our opponents contend, the assessment feature was not a part of the purpose of the law, but a collateral provision for the township's reimbursement; as the township is deprived of the means of compensation, it should not be left with the burden of the debt. Taking either view of the case it can not be presumed that the Legislature would have passed the act in question, omitting section three thereof.

Respectfully submitted,

WALLACE BURCH,
SIMEON M. JOHNSON,
OLIVER G. BAILEY,
Counsel for Defendants in Error.

6440

Supreme Court of the United States.

No. 42.—October Term, 1900.

Louis Loeb, Plaintiff in Error,
vs.
The Trustees of Columbia Township, Hamilton County, Ohio.

In error to the Circuit Court of the United States for the Southern District of Ohio.

[December 10th 1900.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought in the court below by Loeb, a citizen of Indiana, against the Trustees of Columbia Township in Hamilton County, Ohio.

The petition was demurred to upon the ground that it did not state facts sufficient to constitute a cause of action against the township. After argument the demurrer was sustained and, the plaintiff electing not to plead further, judgment was rendered for the defendant.

The suit is upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits.

The questions to be considered relate to the jurisdiction of this court, the validity under the Constitution of the United States of an act of the General Assembly of Ohio in virtue of which the bonds in suit were issued, and the applicability in this case of certain decisions of the Supreme Court of the State rendered after such bonds were executed and delivered.

The pleadings and orders of court make the following case:

The petition alleged that on April 27th 1893 the General Assembly of Ohio passed an act by the first section of which the trustees of that township were authorized and *required* to widen and extend Williams avenue between certain points named and to appropriate and enter upon and hold any real estate within the township necessary for such purpose;

That by the second section of the act the township trustees were directed to "immediately make application to the probate court of the county as provided in section 2236 of the Revised Statutes of Ohio, and thereafter, as far as practicable, the proceedings shall conform to and be had under the provisions of sections 2236 to 2261, inclusive, of the Revised Statutes of Ohio;" and,

That by the fourth section it was provided that "for the purpose of raising money necessary to meet the expense of the improvement, the

trustees of said township are hereby authorized and *directed* to issue the bonds of the township, payable in instalments or at intervals not exceeding in all the period of six years, bearing interest at the rate of six per cent. per annum, which bonds shall not be sold for less than their par value." 90 *Ohio Local Laws*, 251.

The petition did not set out the third section of the act. But as it was the duty of the Circuit Court to take notice of its provisions, and as it must be referred to in order to dispose of the questions arising on this record, it is here given in full:

"The trustees shall receive reasonable compensation for their services, which shall not exceed the sum of twenty-five dollars each, which, with all costs and expense of constructing said improvement, together with the interest on any bonds issued by the trustees for the same, shall be levied and assessed upon *each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned in section one hereof*, and shall be a lien from the date of the assessment upon the respective lots or parcels of lands assessed; said assessment shall be payable in five annual payments, and shall be paid to the township treasurer; and the option of paying his portion of such assessment in full within a period of twenty days from the date of the levy thereof shall be given to each of the property owners, but no notice to the property owners of such option shall be necessary. The township treasurer shall, on or before the second Monday of September, annually, certify all unpaid assessments to the county auditor, and the same shall be placed on the tax list, and shall be, with ten per cent. penalty to cover interest and cost of collection, collected by the county treasurer in the same manner as other taxes are collected, and when collected he shall pay the same to the township treasurer; and all moneys received by the township treasurer on such assessments shall be applied to the payment of the bonds issued under this act, and for no other purpose; and for the purpose of enforcing the collection of the assessments so certified to him, the county treasurer shall have the same power and authority now allowed by law for the collection of State and county taxes." 90 *Ohio Local Laws*, 251.

It further appears from the petition that the township trustees appropriated land for the avenue in the manner provided in the act; and that for the purpose of raising the money necessary to meet the expense of the appropriation the trustees, on or about September 29th 1894, duly executed and issued, in proper form and in accordance with the terms and provisions of the act, twenty-five bonds of Columbia Township of $500 each, five payable respectively in one, two, three, four and five years each, and one for $432 payable one year from date, all of the above date, and numbered consecutively from one to twenty-six inclusive, and all payable to the order of the bearer, at the office of the treasurer of the county, and bearing

interest represented by coupons attached, at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year; that on or about the September 1894 the bonds were sold by the township to a *bona fide* purchaser and the highest bidder for $13,325 and accrued interest; that on or about September 29th 1895 the trustees paid bonds Nos. 1, 2, 3, 4 and 5, then due, each for $500, and No. 26 for $432, and the interest coupons payable on the date last named on the entire issue of the twenty-six bonds; and that on March 29th 1896 the trustees paid the interest coupons, due on that day, on the twenty bonds remaining unpaid, including bonds numbered 6, 7, 8, 9 and 10.

The petition set out each of the bonds last named, and alleged that the plaintiff was the *bona fide* owner and holder for value of each of them, and had demanded payment of each in accordance with its terms, but that payment was refused.

The bonds, dated September 29th 1894, were signed by the trustees and attested by the seal of the township, and were alike in form. Each recited that it was "one of a series of 25 bonds of $500 each, issued by virtue of an act of the General Assembly of the State of Ohio, passed April 27th 1893, authorizing the trustees of Columbia Township to levy an assessment on the real estate abutting on the Williams avenue between Duck Creek road and Madison pike, and one bond for four hundred and thirty-two dollars for the payment of twelve thousand nine hundred and thirty-two dollars, for widening and extending said avenue;" and that "by virtue of said act, the Trustees of Columbia Township hereby acknowledge said township indebted to the bearer in the sum of five hundred dollars, which sum they, as trustees, and for their successors in office, promise to pay to the bearer hereof, upon the surrender of this bond, at the office of the treasurer of said township, on the 29th day of September 1896, and also interest thereon at the rate of six per cent. per annum, payable semi-annually, on the 29th days of March and September of each year, during the continuance of this loan, on presentation to the township treasurer of the respective coupons hereto attached."

A judgment was asked for the amount of bonds 6 to 10 inclusive, with the interest thereon.

The record contains in full the opinion rendered and filed by the court when disposing of the demurrer. 91 *Fed. Rep.* 37. In that opinion it is expressly stated that the following points were made in argument in support of the demurrer:

1. That the petition did not show that the plaintiff was the original holder of the bonds sued on, and if he were an assignee or subsequent holder thereof he was not entitled to maintain the action, because the bonds were payable to bearer, and were not made by a corporation.

2. That the act of the General Assembly, under and by virtue of which the bonds were issued, was in violation of the Constitution of the State, and therefore the bonds were invalid.

3. That the act contravened the provisions of the Constitution of the United States, and therefore the bonds were invalid.

It appears from the opinion of the Circuit Court that the first and second of these points were ruled in favor of the plaintiff. But the third point was decided for the defendant, the court being of opinion that according to the principles laid down in *Norwood* v. *Baker*, 172 *U. S.* 269, the law under which the bonds sued on were issued was repugnant to that clause of the Fourteenth Amendment of the Constitution of the United States forbidding a State to deprive any person of property without due process of law. In disposing of the third point the court referred to the propositions made in its support as having been "claimed" by the township.

I. The first question to be considered is one of the jurisdiction of this court to proceed upon writ of error directly to the Circuit Court.

By the fifth section of the Circuit Court of Appeals Act appeals or writs of error may be prosecuted to this court from the Circuit Courts "*in any case* in which the Constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States." 26 *Stat.* 826, 827–8, *c.* 517.

The petition shows that the parties are citizens of different States. It states no other ground of Federal jurisdiction. If nothing more appeared bearing upon the question of jurisdiction, then it would be held that this court was without authority to review the judgment of the Circuit Court.

Is not this court, however, sufficiently informed by the record that the defendant township, under its general demurrer, "claimed" in the Circuit Court that the statute of Ohio by the authority of which the bonds were issued was in contravention of the Constitution of the United States?

It is said that even if the record shows such a claim to have been made it will not avail the plaintiff; for, it is argued, when the jurisdiction of the Circuit Court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the *defendant* of the repugnancy of a State law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the Circuit Court sustaining such claim. Such an interpretation of the fifth section is not justified by its words. Our right of review by the express words of the statute extends to "any case" of the kind specified in the fifth section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. That section differs from section 709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a State in this, that under the latter section we can

review the final judgment of the State court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a State statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the Circuit Court, no matter by which party, that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.

It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention of the Constitution of the United States. If the Circuit Court had adjudged in this case that the township's claim of unconstitutionality was without merit and had given judgment for the plaintiff, can it be doubted for a moment that the township could have brought the case here directly from the Circuit Court upon writ of error? But if the township, upon a denial of its claim, could invoke our jurisdiction, as of right, upon what principle can the plaintiff be denied the like privilege if the State law upon which his action depended was, upon his adversary's claim, stricken down as void under the Constitution of the United States? Can the case, so far as the township is concerned, be regarded as belonging to the class which the act of Congress brings directly within the cognizance of this court, and yet not be regarded as a case of that class with respect to the plaintiff? The answer to these questions has already been indicated.

It is true that the plaintiff might have carried this case to the Circuit Court of Appeals, and a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the Circuit Court; for, as said in *Robinson* v. *Caldwell*, 165 *U. S.* 359, 362, "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a Circuit Court of the United States the right to have the case finally determined upon its merits both in this court and in the Circuit Court of Appeals," although the latter court, before disposing of a case which might have been brought here directly from the Circuit Court, may certify to this court questions or propositions as indicated in the sixth section of the above act. But the plaintiff was not bound to go to the Circuit Court of Appeals, and thereby cut himself off from the right to have this court declare whether the Circuit Court erred in holding that the State law upon

which he relied for judgment was repugnant to the Constitution of the United States.

Cases in this court are cited which hold that where the plaintiff invokes the jurisdiction of the Circuit Court solely upon the ground of diverse citizenship, and where the claim of the invalidity of a State statute under the Constitution of the United States came from the defendant or arose after the filing of the petition or during the progress of the suit, then the judgment of the Circuit Court of Appeals is final within the meaning of the sixth section of the act of 1891 (26 *Stat.* 826, 828, *c.* 517), declaring that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States." *Colorado Central Mining Co.* v. *Turck*, 150 *U. S.* 138; *Borgmeyer* v. *Idler*, 159 *U. S.* 408, 414; *Ex parte Jones*, 164 *U. S.* 691, 693.

When the question is whether a judgment of the Circuit Court of Appeals is final in a particular case, it may well be that the jurisdiction of the Circuit Court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the Circuit Court is prescribed by the fifth section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was claimed that a State law was repugnant to the Constitution of the United States. In the present case the Circuit Court, upon the claim of one of the parties, applied the Constitution to the case, and put the plaintiff out of court. *Cornell* v. *Green*, 163 *U. S.* 75. Any other interpretation of the statute is inconsistent with the equal right of the plaintiff with the defendant to come here, if unsuccessful, in a case embraced by the fifth section. Here the plaintiff could not have raised in his petition any question of a Federal right. He sued on the bonds held by him, and sought only a judgment for money. His cause of action was not Federal in its nature. He therefore could not have invoked the jurisdiction of the Circuit Court upon any ground except that of diverse citizenship. He could not have added to or enforced jurisdiction by anticipating the defense and alleging in his petition that the defendant township would in its answer claim that the State statute in question was in contravention of the Constitution of the United States; for that would have been matter of defense, and the allegation could, on motion, have been properly stricken from the petition. Nevertheless, the case is one in which there was a claim that a State law was repugnant to the Constitution of the United States.

The views expressed by us as to the scope of the act of 1891 are supported by *Holder* v. *Aultman*, 169 *U. S.* 81, 88. That was an action in the Circuit Court of the United States for the Eastern District of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a Federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: "The Circuit Court, in giving judgment for the plaintiff, held that the contract was made in the State of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that State under the contract, was in conflict with the Constitution of the United States authorizing Congress to regulate interstate commerce. 68 *Fed. Rep.* 467. This was therefore a 'case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the act of March 3d 1891, *c.* 517, § 5. 26 *Stat.* 828. Upon such writ of error, differing in those respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. *Whitten* v. *Tomlinson*, 160 *U. S.* 231, 238; *Penn Ins. Co.* v. *Austin*, 168 *U. S.* 685."

This brings us to the inquiry whether it can be assumed from the present record that a claim was made in the Circuit Court that the statute of the State under the authority of which the bonds in suit were issued was invalid under the Constitution of the United States. There can be but one answer to this question, if we may look to the opinion filed by the Circuit Court when it disposed of the demurrer. Although the demurrer was general in its nature, it referred to the petition and its allegations, and thus brought to the attention of the court the State enactment under which the bonds were issued; and it was certainly competent for the township to claim at the hearing of the demurrer that such enactment upon its face was repugnant to the Constitution of the United States and therefore void. Turning to the opinion of the Circuit Court, made part of the transcript, we find it expressly stated therein not only that such a claim was made by the township on the hearing of the demurrer, but that the judgment sustaining the demurrer and dismissing the petition was placed upon the sole ground that the claim that the State law contravened the Constitution of the United States was well made.

Is the opinion of the Circuit Court of no value to us when considering this case? May we not look to it for the purpose of ascertaining

whether it was claimed that the State law contravened the Constitution of the United States? It is said that we cannot, and that view is supposed to be sustained by *England* v. *Gebhardt*, (1884) 112 *U. S.* 502, 505, 506, which was a writ of error to review a judgment of a Circuit Court remanding to the State court a case removed therefrom under section five of the act of March 3d 1875, *c.* 137, 18 *Stat.* 472. In the petition for removal in that case it was averred that the parties to the suit were citizens of different States, and it was stated generally in the order remanding the case that there was a finding of the court that they were not. That finding was, of course, based upon facts brought to the attention of the court in the proper form. But the facts bearing upon the question of diverse citizenship did not appear in a bill of exceptions, nor in an agreed statement of facts, nor in a special finding in the nature of a special verdict, nor in any other proper or appropriate mode. It, however, did appear from the record that certain affidavits copied into the transcript had been filed in the case. This court held that the affidavits formed no part of the record, saying: "The mere fact that a paper is found among the files in a cause does not of itself make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. *Sargeant* v. *State Bank of Indiana*, 12 *How.* 371, 384; *Fisher* v. *Cockerell*, 5 *Pet.* 248, 254. This must be done by a bill of exceptions, or something which is equivalent. Here, however, that has not been done." The opinion thus concluded: "Neither is the opinion of the court a part of the record. Our Rule 8*, section 2, requires a copy of any opinion that is filed in a cause be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below." That language is not to be taken too broadly or without reference to the particular case then before the court. What was said may undoubtedly be taken as an adjudication that the opinion of the court cannot, under our rule, be referred to for the purpose of ascertaining the evidence or the facts found below upon which the judgment was based; but not as precluding this court from looking into the opinion of the trial court for any purpose what-

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***8.**

WRIT OF ERROR, RETURN AND RECORD.

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which said judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

ever, as for instance for the purpose of ascertaining whether either party claimed, in proper form, that a State law, upon which some of the issues depended, was in contravention of the Constitution of the United States. The principal if not the only object of requiring the opinion to be annexed to and transmitted to this court was that we might be informed of the grounds upon which the court below proceeded. Unless the rule had at least that object, why should it have been adopted?

In *United States* v. *Taylor*, 147 *U. S.* 695, 700, which came from a Circuit Court of the United States, this court said: "It was formerly held that, even in writs of error to a State court, the opinion of the court below was not a part of the record (*Williams* v. *Norris*, 12 *Wheat.* 117, 119; *Rector* v. *Ashley*, 6 *Wall.* 142; *Gibson* v. *Chouteau*, 8 *Wall.* 314); but the inconvenience of this rule became so great that it was subsequently changed (*Murdock* v. *Memphis*, 20 *Wall.* 590), and, finally, the eighth rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript."

In *Sayward* v. *Denny*, 158 *U. S.* 180, 181, in which the question was whether it sufficiently appeared from the record that the State court had denied any Federal right or immunity specially set up or claimed by the party who invoked our jurisdiction, the Chief Justice observed that certain propositions must be regarded as settled—one of which was that the arguments of counsel formed no part of the record, "though the opinions of the State courts are now made such by rule"—citing, among other cases, *United States* v. *Taylor*, above referred to.

The rule of our court referred to does not apply alone to cases brought here from the highest court of a State. It applies, in terms, to all cases brought to this court by writ of error or appeal. What therefore was said in the above cases as to the object and effect of the rule applies to records from a Circuit Court of the United States.

Some light is thrown upon this question by the decisions in cases from the highest courts of the States. In *Murdock* v. *City of Memphis*, 20 *Wall.* 590, 633, it was said that in determining whether a Federal question was actually raised and decided in the State court, "this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of a case was pretty well understood as a common-law phrase at the time that statute [act of 1789] was enacted. But the statutes of the State and new modes of proceedings in those courts have changed and confused the matter very much since that time." After observing that it was in reference to one of the necessities thus brought about that this court had long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana, it was said: "And though we have repeatedly decided that the opinions of other State courts cannot be looked into to ascertain

what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question."

The subject was again considered in *Gross* v. *United States Mortgage Co.*, 108 *U. S.* 477, 486, which came from the Supreme Court of Illinois. After referring to what was said in *Murdock* v. *City of Memphis*, this court said: "We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the Supreme Court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the State court adversely to a right, title or immunity under the Constitution or laws of the United States and specially set up and claimed by the party bringing the writ." It is true that in that case the court stated that any difficulty upon the subject was removed by the statutes of Illinois regulating that subject; but the decision was not placed upon that ground.

It has long been the practice of this court in cases coming from a State court to refer to its opinion made part of the record for the purpose of ascertaining whether any Federal right, specially set up or claimed, had been denied to the plaintiff in error, or whether the judgment rested upon any ground of local law sufficient to dispose of the case without reference to any question of a Federal character. And we have done this without stopping to inquire whether there was any statute of the State requiring the opinion of the court to be filed in the case as part of the record.

For the reasons we have given it must be held that in a case brought here from a Circuit Court the opinion regularly filed below, and which has been annexed to and transmitted with the record, may be examined in order to ascertain, in cases like this, whether either party claimed that a State statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States. By this however we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.

The result is that this court has jurisdiction to review the judgment of the Circuit Court, and to determine every question properly arising in the case. We may therefore determine whether the court below erred in sustaining the demurrer to the petition.

II. One of the questions arising upon the record is whether the defendant township is a corporation within the meaning of that clause of the Judiciary Act of August 13th 1888, *c.* 866, 25 *Stat.* 433, 434, § 1, which excludes from the cognizance of a Circuit or District Court of the United States "any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any

assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." This question affects the jurisdiction of the Circuit Court to take cognizance of this case.

When the act of 1888 was passed it was the established law that a municipal corporation created under the laws of a State with power to sue and be sued and to incur obligations was to be deemed a citizen of that State for purposes of suit by or against it in the courts of the United States. In *Cowles* v. *Mercer County*, 7 *Wall.* 118, 122, this court said: "It is enough for this case that we find the Board of Supervisors [of the county] to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution." *Lincoln County* v. *Luning*, 133 U. S. 529, 531; *McCoy* v. *Washington Co.*, 3 *Wall. Jr. C. C. R.* 381, 384; *Dillon's Removal of Causes*, § 105. We perceive nothing in that act indicating any purpose of Congress to exclude from the jurisdiction of the Circuit Courts of the United States suits by or against municipal corporations having authority by the laws creating them to sue or to incur liabilities in their corporate name. It must therefore be taken that the words "any corporation" in the act of 1888 include municipal as well as private corporations. And it is the settled law of Ohio that a township is suable on account of any liabilities incurred by it. *Harding* v. *Trustees of New Haven Township*, 3 *Ohio St.* 227; *Trustees of Concord Township* v. *Miller*, 5 *Ohio St.* 184; *Wilson* v. *Trustees of No.* 16, 8 *Ohio St.* 174. Now by the statutes of Ohio the defendant township was constituted a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conferred upon it by law, and was made capable of suing and being sued, pleading and being impleaded. 1 *Bates' Anno. Stat. Ohio*, § 1376. It was created for purposes of local administration, and is a corporation. *Fairfield Township* v. *Ladd*, 26 *Ohio St.* 210, 213; *Lane* v. *State*, 39 *Ohio St.* 314. As therefore the bonds in suit were executed by the defendant township, a corporation, and are payable to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them without reference to the citizenship of any prior holder. *Thompson* v. *Perrine*, 106 *U. S.* 589, 592–3. This point was properly decided for the plaintiff.

III. Was the statute under which the bonds in suit were issued in violation of the Constitution of the United States? The Circuit Court held that it was; and the plaintiff having elected to stand upon his petition, the action was dismissed.

Looking at all the provisions of the statute that court held that the case was embraced by *Norwood* v. *Baker*, 172 U. S. 269, 279, 297, and

upon the authority of that case held that the bonds were issued in contravention of the Fourteenth Amendment of the Constitution of the United States prohibiting the taking of property without due process of law.

In *Norwood* v. *Baker* it was said that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation," and that the assessment involved in that case, made against abutting property, to pay the cost and expense of opening a street in a village, was illegal and void because made "under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefit accruing to the abutting property therefrom, to take private property for public use without compensation."

We are of opinion that the Circuit Court erred in holding that the petition made a case that necessarily brought it within the decision in *Norwood* v. *Baker* so far as the relief sought by the plaintiff was concerned.

We have seen that the first section of the act of 1893 authorized and required the improvement to be made, and directed the township to appropriate, enter upon and hold any real estate necessary for such purpose; that the second section directed that proceedings for condemnation be immediately taken in the probate court under specified sections of the Revised Statutes of Ohio; that the third section prescribed how the assessment to meet the cost of improvement shall be made, namely, "upon each front foot of the lots and lands abutting on each side of said Williams avenue between the termini mentioned;" and that a separate section, the fourth, directed bonds to be issued "for the purpose of raising money necessary to meet the expense of the improvement."

The second section of the act directed the trustees of the township to make immediate application to the probate court of the county, as provided in section 2236 of the Revised Statutes of Ohio, and declared that the proceedings thereafter, as far as practicable, should conform to the provisions of sections 2236 to 2261, inclusive. Those sections do not relate to modes of assessment, but only to the steps to be taken by a municipal corporation when it appropriates private property for public purposes. From other sections of those statutes it appears that when the municipal corporation appropriates or otherwise acquires lots or lands for the purpose of laying off, opening, extending, straightening or widening a street, alley or other public highway, or is possessed of property which it desires to improve for street purposes, the council may decline to assess the cost and expenses of such appropriation or acquisition, and of the improvement, upon the general tax list, in which case the same "shall be assessed upon all the taxable real and personal property in the corporation." § 2263. But by

section 2264 it is provided that in all cases where an improvement of any kind is made of an existing street, alley or other public highway, and the council declines to assess the costs and expenses or any part thereof on the general tax list, the amount not so assessed shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, *either* in proportion to the benefits which may result from the improvements, *or* according to the value of the property assessed, *or* by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance, "setting forth specifically the lots and lands to be assessed, may determine before the improvement is made"—the assessments to be payable in one or more instalments, and at such times as the council might prescribe.

Now let it be supposed that the third section of the special act in question prescribed a rule by which all inquiry is precluded in respect of special benefits accruing to the adjoining property owners, and that an assessment under that section would be invalid under the decision in *Norwood* v. *Baker*, as taking private property for public use without just compensation—upon which question we express no opinion—would it follow that the township would escape liability on the bonds? We think not. The fourth section of the act, authorizing and *directing* bonds to be issued for the purpose of raising the money necessary to meet the expenses of the improvement in question, may stand with sections one and two, even if section three were held to be void as prescribing an illegal mode of assessment. The power to issue bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due as well as the interest accruing thereon from time to time, are distinct and separable matters.

If the act under which the bonds were issued had not contained any provision whatever for an assessment to raise money to meet them, the township could not have repudiated its obligation to pay the bonds; for in the act would be found the command of the legislature to widen and extend Williams avenue, to immediately secure by proceedings in the probate court the land required for the proposed work, and to issue bonds to raise the money necessary to meet the expenses of the improvement. We ought not to hold the statute invalid if it failed to provide some legal mode of assessment to raise money to pay the bonds when they matured, with the interest accruing thereon. The statute, so far as the question of the power to issue bonds and put them on the market is concerned, may be carried into effect without reference to the third section. So that if that section were held void under *Norwood* v. *Baker*, the remaining sections, being valid, can stand and their provisions be executed.

There is some ground for saying that the legislature would not have passed the act without the third section; and that was the view expressed

by the learned judge who tried the case below. But we do not think that such is so manifestly the case as to justify the courts in refusing to execute the valid parts of the statute when that can be done in harmony with the intention of the legislature to have the improvement in question made by the township and its cost met by issuing bonds. We think the case comes within *Treasurer* v. *Bank*, 47 *Ohio St.* 503, 523, in which the court said: "The question arises, however, whether, if that portion of the section is declared wholly or in part unconstitutional and void, it may not result in invalidating the entire section. As one section of a statute may be repugnant to the Constitution without renderng the whole act void, so, one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected, or dependent on each other in subject matter, meaning or purpose, that the good cannot remain without the bad. The point is, not whether the parts are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance—whether the provisions are so interdependent that one cannot operate without the other."

The relief asked and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it, and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the third section of the act of 1893 can be legally pursued; and if not, whether the laws of the State do not authorize the adoption of some other mode by which the defendant can be compelled to meet the obligations it assumed under the authority of the legislature of the State. All that we now decide is that, even if the third section of the State statute in question be stricken out as invalid, the petition makes a case entitling the plaintiff to a judgment against the township. Whether a judgment if rendered could be collected, without further legislation, depends upon considerations that need not now be examined.

IV. But it is contended that, independently of any question of Federal law, the statute of Ohio under which the bonds were issued was in violation of the Constitution of that State in that when requiring the defendant township to widen and extend the avenue in question the legislature exercised administrative, not legislative powers. This contention is not supported by the decisions of the Supreme Court of Ohio made prior to the issuing of these bonds. Those decisions were to the contrary.

In *Hibbs* v. *Commissioners*, 35 *Ohio St.* 458, 467, decided in 1880, the question was directly presented as to the validity under the Constitution of Ohio of a statute authorizing and directing a particular county to levy a

special tax, not to exceed a given amount, for the purpose of building, grading and gravelling or macadamizing a named public highway. On behalf of the county it was insisted that the legislature could not constitutionally compel it or the people to make an improvement of merely a local character, for the reason that the local authorities were made by the the Constitution the sole judges of the necessity of such an improvement. The Supreme Court of the State said: "The power of the legislature to pass a mandatory statute, requiring the commissioners to levy the tax and improve the road in question, is denied by the defendant. The only provision which the Constitution contains with respect to the county commissioners is the following: 'The commissioners of counties, the trustees of townships, and similar boards, shall have power of local taxation as may be prescribed by law.' *Art.* 10, *sec.* 7. Manifestly this is no limitation on the power of the General Assembly; and the inquiry therefore is as to the extent of such power. That it is only legislative is conceded, but that is undeniably a very broad power and includes, generally, the right to direct, *in invitum*, the construction and repair of public highways, and the levy of taxes to defray the necessary expenses thereof. That the power is liable to great abuse is denied by no one, but the responsibility, as well as the power, rests with the legislature."

But in *State* v. *Commissioners*, 54 *Ohio St.* 333, and *Hixson* v. *Burson*, *Id.* 470, decided in 1896, the principle announced in *Hibbs* v. *Commissioners* was declared to be unsound. In the first case the Supreme Court of Ohio held to be invalid an act of the legislature which, without the petition of any one interested, authorized certain local improvements to be made with the consent of the county commissioners, but which was so framed as to require the commissioners to proceed in the way and to the extent mapped out by the legislature. The court said that the act was "an assumption of powers over the affairs of a county not possessed by the general assembly—it is administrative in character and not legislative." "It is simply a usurpation of the powers heretofore always allowed to the proper administrative boards selected by the people of the localities concerned, in the exercise of the right of local self government." In the latter case the court expressly overruled the second syllabus in *Hibbs* v. *Commissioners*, (which under the statutes of Ohio is to be regarded as presenting the point adjudged,) stating that "an act providing for the improvement of a designated county road is local in its nature, and not in conflict with Article 2, section 26, of the Constitution, which provides that 'all laws of a general nature shall have a uniform operation throughout the State.'"

What, under these circumstances, was the duty of the Circuit Court? That court, speaking by Judge Thompson, held that its duty was to enforce the provisions of the Constitution of Ohio as interpreted by the Supreme

Court of that State at the time the bonds were issued, and not permit the contrary decisions, made after the bonds were issued, to have a retroactive effect. This was in accordance with the long-established doctrine of this court, to the effect that the question arising in a suit in a Federal court of the power of a municipal corporation to make negotiable securities is to be determined by the law as judicially declared by the highest court of the State when the securities were issued, and that the rights and obligations of parties accruing under such a state of the law would not be affected by a different course of judicial decisions subsequently rendered any more than by subsequent legislation. Our decisions to that effect are so numerous that any further discussion of the question is unnecessary, and we need only cite some of the adjudged cases. *Rowan* v. *Runnels*, 5 *How.* 134; *Ohio Life Ins. Co.* v. *Debolt*, 16 *How.* 416, 432; *Olcott* v. *The Supervisors*, 16 *Wall.* 678; *Douglass* v. *County of Pike*, 101 *U. S.* 677; *Taylor* v. *Ypsilanti*, 105 *U. S.* 60, 71; *County of Ralls* v. *Douglass*, 105 *U. S.* 728; *Green County* v. *Conness*, 109 *U. S.* 104, 105; *Anderson* v. *Santa Anna*, 116 *U. S.* 356, 361–2; *German Bank* v. *Franklin County*, 128 *U. S.* 526, 539; *Wade* v. *Travis County*, 174 *U. S.* 499, 510.

It should be here said that the doctrine of prior cases was not in anywise changed or impaired by the decision in *Central Land Company* v. *Laidley*, 159 *U. S.* 103, 111, in which it was held that, under the statute giving this court authority to review the judgment of the highest court of the State, we were without jurisdiction if the action of that court was impeached simply on the ground that it had not determined the rights of the plaintiff in error in accordance with its decisions in force when those rights accrued, but had followed its decisions of a contrary character rendered after his rights had accrued. This court held that a mere change of decision in the State court did not present a question of Federal right under that clause of the Constitution of the United States prohibiting a State from passing any law impairing the obligation of contracts—that the question of such impairment did not arise unless the judgment complained of gave effect to some provision of the State Constitution or some enactment claimed by the defeated party to impair the obligation of the particular contract in question. As, however, the Circuit Courts of the United States are courts of "an independent jurisdiction in the administration of State laws co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws," (*Burgess* v. *Seligman*, 107 *U. S.* 20, 33, 34, *Folsom* v. *Ninety-six*, 159 *U. S.* 611, 624, 625,) they may, in suits within their jurisdiction, properly hold, as in numerous cases this court has held, that the rights of parties arising under contracts not involving questions of a Federal nature are to be determined in accordance with the settled principles of local law as maintained by the highest court

of the State at the time such rights accrued. The statutory provision that the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in courts of the United States, in cases where they apply, (*Rev. Stat. U. S.* § 721,) has not been construed as absolutely requiring conformity, in such cases, to decisions of the State courts rendered after the rights of parties have accrued under the previous decisions of those courts of a contrary character.

It results that the Circuit Court did not err in overruling the point raised under the demurrer at the hearing below, to the effect that the State enactment was invalid under the Constitution of the State.

The judgment is reversed and the cause remanded with directions for further proceedings consistent with law and this opinion.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.